NO. 93-929

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1993

INTERCONTINENTAL BULKTANK CORPORATION
Petitioner

VERSUS

JOHN E. JORDAN
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE LOUISIANA COURT OF APPEAL FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. The Court should grant *certiorari* to resolve a longstanding split in the circuit courts as to whether arbitrary and capicious delay by a vessel owner in paying maintenance and cure to a seaman can give rise to punitive damages, as a matter of law. Punitive damages are allowed by the First and Fifth Circuits based upon the dissenting opinion in *Vaughan v. Atkinson*, 369 U.S. 527, 82 S.Ct. 997 (1962). The Second Circuit, following the majority opinion in *Vaughan*, allows only compensatory damages and attorneys' fees.

2. Alternatively, if punitive damages are available in such cases as a matter of law, the Court should grant *certiorari* because in the instant case, there was insufficient evidence to support such an award, in violation of petitioner's right to due process of law. There was no award of compensatory damages relating to this issue, no evidence of the motive of petitioner, a vessel owner, for delay in payment of maintenance and cure and no evidence of malice. There was evidence that cure was not timely paid because petitioner relied upon plaintiff's union to make timely payments, as required by the collective bargaining agreement between the union and petitioner.

3. The Court should grant *certiorari* because petitioner's right to due process was violated by failure of the courts below: (a) to apply the evidence in the record to the appropriate standards in determining

propriety of the amount of punitive damages awarded in this case; (b) to instruct the jury and thereby provide minimum guidance in assessing punitive damages; (c) to conduct a sufficient post-verdict review; (d) to grant a mistrial or a reversal when plaintiff's counsel was allowed to testify on punitive damages and to refer in argument to another case where petitioners allegedly were assessed punitive damages, when there was no evidence of such and, when plaintiff fraternized with the jury during the course of the trial; and (e) in holding petitioner to an improper and unconstitutional burden of proof on its motions for mistrial, specifically, requiring petitioner to show it was "impossible" for it to receive a fair trial.

4. The Court should grant *certiorari* as the courts below erred in applying the law by allowing the jury to award separate damages for both: (a) mental pain and suffering and (b) mental anguish, resulting in double recovery.

LIST OF PARTIES

The following are the parties to this proceeding:

1. John E. Jordan,
plaintiff-respondent;

2. Intercontinental Bulktank Corporation,
defendant-petitioner.*

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* Pursuant to Supreme Court Rule 29.1, Intercontinental Bulktank Corporation is part of the group of companies which comprise the Overseas Shipholding Group, Inc., 1114 Avenue of the Americas, New York, NY 10036.

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DECISIONS BELOW

The decision of the Louisiana Court of Appeal is reported at 621 So.2d 1141 (La.App. 1st Cir. 1993), and is reproduced in Appendix A. (App. pp. 1a-40a.) On April 28, 1993, the Louisiana First Circuit denied the application for rehearing filed by Intercontinental Bulktank Corporation (hereinafter "IBC"), which order is reproduced in Appendix B. (App. p.41a.)

On September 17, 1993, the Supreme Court of Louisiana denied the applications for writs of *certiorari* filed by plaintiff and IBC, which are reported at 623 So.2d 1335 and 623 So.2d 1336, respectively, and reproduced in Appendices C and D. (App. pp. 42a-43a and 44a-45a.)

On September 24, 1993, the Louisiana Supreme Court stayed the execution and enforcement of the judgment of the Louisiana First Circuit for ninety days, pending IBC's petition to this Court, which order is reproduced in Appendix E. (App. p. 46a.) On October 8, 1993, the Louisiana Supreme Court denied Jordan's motion to reconsider that order, which is reported at ____ So.2d ____, and reproduced in Appendix F. (App. pp. 47a-48a.)

JURISDICTION

On February 19, 1993, a three judge majority of the Louisiana First Circuit Court of Appeal entered the judgment from which IBC seeks review. On April 28, 1993, the same three judge majority denied IBC's application for rehearing.

IBC timely filed its application for writs of *certiorari* or review with the Supreme Court of Louisiana, which the court denied on September 17, 1993. This Honorable Court has jurisdiction pursuant to 28 U.S.C. §1257 and Rule 10 of the Rules of the Supreme Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following amendments to the Constitution of the

United States are involved in this petition:

U.S. Const. amend. V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. XIV, §1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The following statute is involved in this petition:

46 U.S.C. §688(a)(The Jones Act):

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right to trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such a seaman may maintain an action for damages at law with the right to trial by jury, and in such action all statutes of the United States conferring or regulating the right of

action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principle office is located.

STATEMENT OF THE CASE

On July 17, 1988, Jordan sued IBC in the Eighteenth Judicial District Court, West Baton Rouge Parish, seeking damages for injuries sustained in an accident on June 2, 1988, for negligence under the Jones Act (46 U.S.C. §688) and unseaworthiness under the general maritime law. Jordan also sought unpaid maintenance and cure, and punitive damages and attorneys' fees for IBC's alleged willful and wanton failure to pay maintenance and cure.

The jury trial began on June 15, 1990. To authenticate correspondence concerning maintenance and cure counsel for Jordan allegedly sent to counsel for IBC, Jordan called his counsel (Terry Bell) as a witness. (R. Vol. 2, pp. 264-303, reproduced in Appendix H, pp. 54a - 96a.) Bell's testimony was not limited to identifying correspondence but improperly included his legal opinion of IBC's maintenance and cure obligation. IBC objected to Bell's testimony as violating Louisiana Rule of Professional Conduct 3.7(a) and unduly prejudicing IBC by allowing Bell to merge the roles of advocate and "disinterested" witness. (R. Vol. 2, pp. 265-67, App. H, pp. 54a - 55a.) The trial court overruled the objection. At the conclusion of Bell's testimony, IBC moved for a mistrial and to disqualify Bell as Jordan's counsel; both motions were denied. (R. Vol. 2., pp. 297, 302-03, App. H, pp. 91a - 96a.) IBC then filed an application for emergency writ with the First Circuit which was denied that afternoon.

On the second day of trial, Jordan engaged several jurors in conversation, in violation of the trial judge's specific instructions. (R. Vol. 3, pp. 670-75, reproduced in Appendix I, pp. 97a - 100a.) Arguing this conduct prejudiced the jury in favor of Jordan, IBC moved for a mistrial.

The trial court, after speaking privately with the jurors, but without revealing the substance of the conversation in any detail, denied the motion. (R. Vol. 3, pp. 674-75, App. I, pp. 100a - 101a.)

At the close of IBC's case, the trial court granted Jordan's motion for directed verdict on the issue of unpaid maintenance and cure and awarded maintenance to the date of trial at $17.00 per day for a total of $12,665.00, subject to an offset of $4,144.00 maintenance IBC had paid and rejecting the $8.00 per day maintenance rate set forth in the union collective bargaining agreement. Adding medical expenses not paid by the Seafarer's Welfare Plan (a program designed to pay seamen's medical expenses funded entirely by employers of union seaman) and crediting IBC for sums already paid to Jordan ($4,144.00), the trial court fixed the total amount of maintenance and cure due at $11,050.20.

The jury returned a verdict in Jordan's favor on both his Jones Act negligence and general maritime law unseaworthiness claims, awarding damages for: (1) lost wages - $250,000.00; (2) mental anguish - $125,000; (3) past and future physicial pain and suffering - $150,000; and (4) past and future mental pain and suffering - $125,000.00. The jury found IBC arbitrary and capricious in failing to pay maintenance and cure timely and awarded punitive damages of $1,000,000.00, and the district court entered judgment in accordance with those findings. (Judgment, reproduced in G, pp. 49a - 53a.)

IBC moved for a new trial on several bases, including that plaintiff's counsel was allowed to testify as a witness concerning punitive damages; plaintiff fraternized with several of the jurors during the trial; and, because during closing argument plaintiff's counsel repeatedly referred to another case allegedly involving IBC in which a jury had awarded punitive damage, as to which there was no evidence in the record. The motion for new trial was denied without briefing, oral argument, or assignment of written reasons.

Faced with the extremely onerous bonding require

ment of the punitive damage award, IBC sought supervisory writs with the Louisiana First Circuit prior to appeal. A divided panel denied the application on the basis that IBC had an adequate remedy on appeal. One judge dissented, stating that the case should be "remand[ed] to the trial court for a new trial on the issue of punitive damages."

IBC appealed the judgment and rulings of the district court which: (1) allowed plaintiff's counsel to testify on the issue of punitive damages; (2) directed a verdict on the issue of maintenance and cure; (3) allowed plaintiff to communicate with the jury; (4) awarded duplicative damages for both mental anguish and pain and suffering; and (5) awarded $1,000,000 in punitive damages on the basis that such was unconstitutionally excessive and denied IBC procedural due process of law pursuant to the Fifth and Fourteenth Amendments of the U.S. Constitution.

On February 19, 1993, a three judge majority of a five judge panel of the Louisiana First Circuit affirmed in part and reversed in part the judgment of the trial court. (App. A, pp. 1a - 40a.) Among other rulings, the court followed the majority rule of the general maritime law and enforced the $8.00 per day rate in the collective bargaining agreement between Jordan's union and IBC, and reduced the award of maintenance from $8,521.00 to $1,816.00, which when combined with unpaid cure totaled $4,345.20 (App. A, pp. 26a - 27a.) The Louisiana First Circuit did not address the alleged constitutional defects in the award of punitive damages but rather concluded that the award was excessive under Louisiana law and reduced the award from $1,000,000.00 to $500,000.00. (App. A, pp. 31a - 32a.)

Two of the judges dissented because the cumulative effect of permitting Jordan's counsel to testify and allowing Jordan to communicate with the jury denied IBC a fair trial. (App. A, pp. 36a - 40a)(Shortess, J., joined by Gonzales, J. dissenting). Judge Gonzales filed a separate dissenting opinion noting that the award of $500,000.00 in punitive damages was the largest punitive damage award

ever assessed for a delay in paying maintenance and cure, and was an abuse of discretion given the minimal amount the majority concluded was owed. That judge concluded that the largest permissible award was $150,000.00. (App. A, pp. 39a - 40a (Gonzales, J., dissenting.)

On March 5, 1993, IBC applied for rehearing with the First Circuit seeking reconsideration of the constitutionality of the punitive damage award pursuant to the decision of *Pacific Mutual Life Ins. Co. v. Haslip,* 499 U.S. 1, 111 S.Ct. 1032 (1991), which had been decided subsequent to the filing of the initial briefs. On April 28, 1993, the First Circuit, by a three to two divided panel, denied rehearing. (App. B, p. 41a.) Two of the judges would have granted rehearing for the reasons stated in their dissents.

On May 28, 1993, IBC filed an application for writ of *certiorari* or review with the Louisiana Supreme Court. In its application for the writ, IBC sought review of the same issues presented to this Court in addition to several issues pertaining to Louisiana law for which IBC does not seek review before this Court. Jordan also filed an application for writ of *certiorari* or review with the Louisiana Supreme Court. On September 17, 1993, five judges denied IBC and plaintiff's applications for the writs with two indicating the writ should be accepted. (623 So.2d 1335-36, Apps. C & D, pp. 42a - 43a and 44a - 45a.)

On September 24, 1993, the Louisiana Supreme Court stayed the execution of the judgment of the Louisiana First Circuit for ninety days pending IBC's petition to this Court. (App. E, p. 46a.) On October 8, 1993, that Court denied Jordan's motion to reconsider that order. (App. F, pp. 47a - 48a.)

REASONS FOR GRANTING THE WRIT

I. PUNITIVE DAMAGES ARE NOT AVAILABLE, AS A MATTER OF LAW, FOR THE ARBITRARY AND CAPRICIOUS FAILURE TO PAY MAINTENANCE AND CURE.

IBC has challenged the constitutionality of the award of punitive damages for its arbitrary and capricious

failure to pay Jordan maintenance and cure, as violative of its rights to procedural due process of law. However, IBC submits the Court initially must resolve whether punitive damages are recoverable as a matter of law in this federal maritime action, as this Court has never upheld such an award. Such inquiry is proper as the Court ordinarily will defer discussion of constitutional issues if other non-constitutional grounds, such as statutory construction or application of the law, will dispose of the issue. *Hagans v. Levine,* 415 U.S. 528, 547 n. 12, 94 S.Ct. 1372, 1384 n. 12 (1974); *Ashwand v. Tennessee Valley Auth.,* 297 U.S. 288, 347, 56 S.Ct. 466, 483 (1936)(Brandeis, J., concurring).

The Court should grant *certiorari* to resolve a longstanding split in the circuit courts of appeals as to whether an arbitrary and capricious delay by a vessel owner in paying maintenance and cure to a seaman can give rise to punitive damages. Punitive damages are allowed by the First and Fifth Circuits based upon the *dissenting* opinion in *Vaughan v. Atkinson,* 369 U.S. 527, 82 S.Ct. 997 (1962). See *Robinson v. Pocahontas Inc.,* 477 F.2d 1048 (1st Cir. 1973); *Holmes v. J. Ray McDermott Co., Inc.,* 734 F.2d 1110 (5th Cir. 1989). The Second Circuit, following the majority opinion in *Vaughn,* allows only compensatory damages, including attorney's fees. *Kraljic v. Berman Enter., Inc.,* 575 F.2d 412 (2nd Cir. 1978).

Although widely and *erroneously* cited as authority for the proposition that punitive damages are available for the failure to provide maintenance and cure, *Vaughan* holds only that a seaman can recover "damages suffered," not punitive damages. The defendants in *Vaughan* were found to have been callous in not investigating Vaughan's claim. "[B]y their silence neither admitting or denying it," Vaughan was forced to retain a lawyer "to get what was plainly due," maintenance and cure. "While failure to give maintenance and cure may give rise to a claim for damages for the suffering and for the physicial handicap which follows (*The Iroquois,* 194 U.S. 240, 24 S.Ct. 640, 48 L.Ed. 955), the recovery may also include 'necessary expenses.' " *Vaughan,* 369 U.S. at 530, 82 S.Ct. at 999. "It is difficult

to imagine a clearer case of *damages suffered* for failure to pay maintenance and cure than this one." *Id.* at 531, 82 S.Ct. at 999-1000 (emphasis added).

The choice of the language "damages suffered" clearly shows the Court awarded compensatory damages, not punitive damages. As the unreasonable conduct of the defendants required Vaughan to incur attorney's fees, this Court held he was entitled to recover these attorney's fees as his "necessary expenses."

In his *dissent*, Justice Stewart (joined only by Justice Harlan) argued "[I]f the shipowner's refusal to pay maintenance stemmed from a wanton and intentional disregard of the legal rights of the seaman, the latter would be entitled to exemplary damages in accord with the traditional concepts of the law of damages." *Id.* at 540, 82 S.Ct. at 1004. The dissent's discussion of exemplary damages shows the issue of punitive damages was before the Court. The clear majority, however, rejected such, holding instead the seaman should be compensated for his "necessary expenses" and "damages suffered."

In *Robinson*, the First Circuit held punitive damages were available to a seaman for his employer's refusal to pay maintenance and cure. To support this holding, the court cited Justice Stewart's *dissent* in *Vaughan*, which the First Circuit incredibly described as "dissenting primarily on the question of the extent of a seaman's recovery for maintenance and cure but seemingly in agreement with the majority's fundamental premise." *Robinson*, 477 F.2d at 1051. This misstates the holding of *Vaughan* and gives improper weight to the dissenting opinion. The question is not whether the dissenting opinion agreed with any or all of the majority's premise, but whether the majority accepted the dissent's position. The *Vaughan* majority carefully stated the seaman was entitled to recover the "damages suffered." *Vaughan*, 369 U.S. at 531, 82 S.Ct. at 999-1000. The *Robinson* court can not justify the leap it makes to hold that *Vaughan* authorizes the award of punitive damages.

The *Holmes* decision was the first Fifth Circuit case to award substantial, truly punitive damages for failure to provide maintenance and cure. The Fifth Circuit held that while *Vaughan* allowed recovery of attorney's fees, subsequent cases allowed recovery of punitive damages. *Holmes*, 734 F.2d at 1118 (citing *In Re Merry Shipping, Inc.*, 650 F.2d 622 (5th Cir.), *reh'g denied*, 659 F.2d 1079 (5th Cir. 1981) (table) and *Robinson, supra*). IBC suggests *Merry Shipping* did not concern maintenance and cure and, as noted, *Robinson* clearly misinterpreted the holding of *Vaughan*. Moreover, IBC submits, *infra*, that the reasoning of *Merry Shipping* has been overruled by *Miles v. Apex Marine Corp*, 498 U.S. 19, 111 S.Ct. 317 (1990).

In *Kraljic*, the Second Circuit held that the damages available to a seaman for the failure to provide maintenance and cure were limited to compensatory damages including attorney's fees. *Kraljic*, 575 F.2d at 414-15. See also *Owens v. Conticarriers & Terminals, Inc.*, 591 F.Supp. 777, 792 (W.D. Tenn. 1984). That court properly criticized *Robinson* for following the dissent of *Vaughan* rather than the majority.

This Court should grant *certiorari* as its opinion in *Vaughan*, followed by the Second Circuit in *Kraljic*, limits a seaman's recovery for his employer's failure to pay maintenance and cure to compensatory damages and attorneys' fees.

A. *Miles v. Apex Marine* provides the applicable analysis of this issue.

In *Miles*, this Court in an 8-0 decision held recovery for loss of society was not available under the general maritime law to *any* beneficiary of a true seaman and denied recovery of future loss of earnings to the estate of a deceased seaman, even if there is a general maritime law survival action. The Court's decision made it abundantly clear that, under the Jones Act or the *general maritime law*, a seaman's or his beneficiary's recovery is limited to those damages provided by the statute enacted specifically to deal with seamen's rights — The Jones Act, 46 U.S.C. §688.

The Court stated:

> Admiralty is not created in a vacuum; legislation has always served as an important source of both common law and admiralty principles.
>
> * * *
>
> The legislature does not, of course, merely enact general policies. By the terms of a statute, it also indicates its conception of the sphere within which the policy is to have effect." *Moragne, supra,* at 892. Congress, in the exercise of its legislative powers, is free to say "this much and no more." An admiralty court is not free to go beyond those limits.

Id. at 24, 111 S.Ct. at 321.

The *Miles* court was quite clear in its reliance upon relevant statutes as guidelines for judge-made law. Questioning the license of courts to fill gaps left by statutes, the Court noted:

> But in an "area covered by the statute, it would be no more appropriate to prescribe a different measure of damages than to prescribe a different statute of limitations, or a different class of beneficiaries." *Higginbotham, supra,* at 625.

Id. at 31, 111 S.Ct. at 325.

> Incorporating FELA unaltered into the Jones Act, Congress must have intended to incorporate the pecuniary limitation of damages as well.

Id. at 32, 111 S.Ct. at 325.

Perhaps the clearest message was Justice O'Connor's statement that:

> It would be inconsistent with our place in the constitutional scheme were we to sanction more expansive remedies in a judicially-created cause of action in which liability is without fault than Congress has allowed in cases of death resulting from negligence.

Id. at 32-33, 111 S.Ct. at 326.

The right to maintenance and cure, like a seaman's right to damages for breach of the warranty of seaworthiness, is based upon a *quasi*-contractual obligation and exists even absent fault. The Jones Act clearly does not permit recovery of non-pecuniary damages, in either a death or an injury case. See *Murray v. Anthony J. Bertucci Constr. Co.*, 958 F.2d 127 (5th Cir.), *cert. denied*, ____ U.S. ____, 113 S.Ct. 190 (1992); *Michel v. Total Transp., Inc.*, 957 F.2d 186 (5th Cir. 1992). Thus, the Court's guidelines in *Miles* prohibit awarding other than compensatory damages in any action involving a Jones Act seaman, whether the vehicle for recovery be the Jones Act or a general maritime law *quasi*-contract remedy for unseaworthiness, for maintenance and cure, or for damages for the failure to provide maintenance and cure. As Justice O'Conner stated:

> Because this case involves the death of a seaman, we must look to the Jones Act.
>
> * * *
>
> Congress has limited the survival right for seamen's injuries resulting from negligence. As with loss of society in wrongful death actions, this forecloses the more expansive remedies in a general maritime action founded on strict liability.
>
> * * *
>
> Because Torregano's estate cannot recover for his lost future income under the Jones Act, it cannot do so under the general maritime law.

Miles, 498 U.S. at 36, 111 S.Ct. at 328.

In *Murray* and *Michel*, separate panels of the Fifth Circuit applied the *Miles* holding that seaman's beneficiaries are entitled only to pecuniary damages to *injury* claims by Jones Act seamen brought under the general maritime law. Although *Murray* and *Michel* involved loss of consortium, their rationale applies equally to punitive damages.

B. *Miles v. Apex Marine* bars the recovery of punitive damages by seamen.

In *Miller v. American President Line, Ltd.*, 989 F.2d 1450 (6th Cir.), *cert. denied*, ____ U.S. ____, 114 S.Ct. 304 (1993), the Sixth Circuit squarely held punitive damages were not recoverable under the general maritime law for unseaworthiness based on *Miles'* holding that the Jones Act and the damages thereunder through the incorporation of the FELA, 45 U.S.C. §51 *et seq.*, were the sole damages for a seaman, whether he proceeded under the Jones Act or pursued a general maritime law claim. "Looking primarily to the federal maritime wrongful death statutes for guidance, we hold that punitive damages are not available in a general maritime law unseaworthiness action for the wrongful death of a seaman." *Id.* at 1459.

Likewise, in *Wahlstrom v. Kawasaki Heavy Indus., Ltd.*, 4 F.3d 1084 (2d Cir. 1993), the Second Circuit concluded the analysis of *Miles*, the Jones Act, and the Death on the High Seas Act (DOHSA), 46 U.S.C. §§761-767, precluded the award of punitive damages to Wahlstrom's estate for his wrongful death arising out of the collision of his jet-ski and a vessel on navigable waters. "We are in general agreement with the view that plaintiffs who are not allowed by general maritime law to seek nonpecuniary damages for loss of society should also be barred from seeking nonpecuniary punitive damages." *Id.* at 1094. Cf. *Mistich v. Pipelines, Inc.*, 609 So.2d 921, 935 (La. App. 4th Cir. 1992), *writ denied*, 613 So.2d 996 (La. 1993), *cert. denied*, ____ U.S. ____, 113 S.Ct. 3020 (1993)(distinguishing loss of society, a nonpecuniary but compensatory award barred by *Miles*, and punitive damages, a nonpecuniary and non-compensatory award, which purportedly are not addressed by *Miles*).

Additionally, with few exceptions, the various U.S. District Courts considering whether *Miles* prohibits the award of punitive damages to a Jones Act seaman in an action for unseaworthiness under the general maritime law,

have held *Miles* prohibits such award.[1] Several courts also base this prohibition on the fact that unseaworthiness, liability without fault, can not provide a vehicle for recovery of damages due to gross negligence or willful or wanton conduct, as such obviously involved *negligence*, and a seaman's only remedy against his employer for negligence is the Jones Act. See *e.g. Haltom v. Lykes Bros. S.S. Co.*, 771 F.Supp. 179 (E.D. Tex. 1991); *In Re Mardoc Asbestos Cases*, 768 F.Supp 595 (E.D. Mich. 1991).

Subsequent to *Miles*, several courts have considered whether a Jones Act seaman can recover punitive damages for failure to provide maintenance and cure. Two of these cases, *LaVoie v. Kualoa Ranch & Activity Club, Inc.*, 797 F.Supp. 827 (D. Hawaii 1992) and *Gray v. Texaco, Inc.*, 610 So.2d 1090 (La. App. 3rd Cir. 1992), *writs denied*, 616 So.2d 686, 687 (La. 1993), have properly denied recovery of punitive damages for failure to provide maintenance and cure in a claim under the general maritime law brought by a Jones Act seaman. Both decisions properly base their opinions on the clear guidelines set forth in *Miles*.

Several U.S. District Courts have held a Jones Act seaman can recover punitive damages for his employer's failure to provide maintenance and cure, where the failure was unreasonable, arbitrary, capricious, willful or

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[1] *Horsley v. Mobil Oil Corp.*, 825 F.Supp. 424 (D. Mass. 1993); *Boykin v. Bergesen D.Y. A/S*, 822 F.Supp. 324 (E.D. Va. 1993); *Boyette v. Keene Corp.*, 815 F.Supp. 204 (E.D. Tex. 1993); *Ortega v. Oceantrawl, Inc.*, 822 F.Supp. 621 (D. Alaska 1992); *Jackson v. Unisea, Inc.*, 824 F.Supp. 895 (D. Alaska 1992); *Matter of Waterman S.S. Corp.*, 780 F.Supp. 1093 (E.D. La. 1992); *Anderson v. Texaco, Inc.*, 797 F. Supp. 531 (E.D. La. 1992); *Petition of Cleveland Tankers, Inc.*, 791 F.Supp. 679 (E.D. Mich. 1992); *LaVoie v. Kualoa Ranch & Activity Club, Inc.*, 797 F.Supp. 827 (D. Haw. 1992); *Ellison v. Messerschmitt-Bolkow-Blohm*, 807 F. Supp. 39 (E.D. Tex. 1992); *Haltom v. Lykes Bros. S.S. Co.*, 771 F.Supp. 179 (E.D. Tex. 1991); *Rollins v. Peterson Builders, Inc.*, 761 F.Supp. 943 (D.R.I. 1991); *In Re Mardoc Asbestos Cases*, 768 F. Supp. 595 (E.D. Mich. 1991); *Complaint of Aleutian Enter., Ltd.*, 777 F. Supp. 793 (W.D. Wash. 1991); Cf. *Duplantis v. Texaco, Inc.*, 771 F.Supp. 787 (E.D. La. 1991).

wanton.[2] However, IBC submits that the reasoning of those courts — generally allowing punitive damages for failure to provide maintenance and cure because it is a remedy based on contract, and because it has no statutory counterpart—is faulty and in conflict with the guidelines set forth in *Miles* and as recognized and discussed in *Miller* and *Wahlstrom.*

Representative of several of such decisions, is *Howard v. Atlantic & Pacific Marine Corp.*, 1992 WL 55487 (E.D. La. 1992), where the court reasons that:

> However, unlike unseaworthiness and negligence claims, maintenance and cure claims have no counterpart under the Jones Act or the DOHSA. A seaman's right to maintenance and cure is implied in the employment contract between seaman and shipowner, and it is "in no sense predicated upon the fault or negligence of the shipowner," citing *Brister v. AWI, Inc.*, 946 F.2d 350 (5th Cir. 1991).

Howard, supra, at p. 2.

This is the same argument the defendants faced in *Miles.* Unseaworthiness has "no counterpart under the Jones Act," and unseaworthiness is not predicated upon fault or negligence of the shipowner. Unseaworthiness involves a breach of the *warranty* to provide a seaworthy vessel — a contractual concept demonstrating the obligations of the shipowner to seamen who serve aboard his vessels.

Moreover, while the district court correctly quoted *Brister* that the maintenance and cure obligation is not predicated upon fault or negligence of the shipowner, this Court (*Cortes v. Baltimore Insular Line,* 287 U.S. 367, 53 S.Ct. 173 (1939)), the U.S. Fifth Circuit Court of Appeal

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[2] *Ridenour v. Holland Amer. Line Westours, Inc.*, 806 F. Supp. 910 (W.D. Wash. 1992); *Nelsen v. Research Corp. of Univ. of Haw.*, 805 F. Supp. 837 (D. Haw. 1992); *Ortega v. Ocean trawl, Inc.*, 822 F.Supp. 621 (D. Alaska 1992); and the reported unreported cases discussed, *infra,* pp. 14-16.

(*Picou v. American Offshore Fleet, Inc.*, 576 F.2d 585 (5th Cir. 1978)) and the Louisiana First Circuit Court of Appeal (*Hebert v. Aetna Casualty & Surety Co.*, 400 So.2d 695, 698 (La.App. 1st Cir. 1981)), all have held that *failure to provide* maintenance and/or cure *is a tort* by the employer — *cognizable under the Jones Act, Cortes, supra.* Since a seaman's only negligence right against his employer is the Jones Act, the failure to provide maintenance gives rise to a negligence claim under the Jones Act, *Miles* clearly controls and punitive damages are not allowed.

In *Anderson v. Texaco, Inc.*, 797 F.Supp. 531 (E.D. La. 1992), the court attempted to distinguish *Miles* on the theory that a punitive damage award for failure to provide maintenance and cure is "...a firmly rooted general maritime law claim...and is a contractual claim not reached by any maritime statute. Such claims do not implicate negligence or strict liability values." *Id.* at 536. IBC disputes that punitive damages for failing to provide maintenance and cure is a concept "firmly rooted in general maritime law," Cf. *Vaughan, supra.*

IBC also disagrees with the *Anderson* court that "failure to pay is a contractual claim" — as this Court (*Cortes, supra*), the U.S. Fifth Circuit Court (*Picou, supra*) and the Louisiana First Circuit Court of Appeal (*Hebert, supra*) all have held it is a tort claim which makes the Jones Act control and precludes punitive damages.

Finally, as noted, it is not dispositive that failure to provide maintenance and cure is not "reached by any maritime statute," because a seaman's general maritime law cause of action for unseaworthiness is not reached by the Jones Act or any maritime statute. However, a statute, the Jones Act, "both directs and delimits" the rights of seamen. *Miles,* 498 U.S. at 27, 111 S.Ct. at 323.

In *Rowan Companies, Inc. v. Badeaux,* 1991 WL 175541 (E.D. La. 1991), the court expressed an additional reason why it felt recovery of punitive damages for failure to provide maintenance and cure is not foreclosed by *Miles.*

As stated in *Cornish* [1991 WL 148746 (E.D. La.

> 1991)], "there is no extensive legislation from Congress with respect to maintenance and cure. Congress has left to the courts the task of 'writing the rules' on maintenance and cure.

Rowan, at p.2 (citation added).

However, there *also* is "no extensive legislation from Congress" dealing with seamen's rights to recover damages for breach of the warranty of seaworthiness, which cause of action arises only under the general maritime law.

Both the warranty of seaworthiness and maintenance and cure involve obligations arising from the nature of the seaman's employment aboard a vessel; both are based upon the concept of liability without fault. Both involve *quasi*-contractual relationships and obligations. Neither the warranty of seaworthiness nor the obligation to provide maintenance and cure are the subject of any specific legislation, and any damages recoverable for a breach of either clearly are limited by *Miles*.

While the obligation to provide maintenance and cure arises out of the contract of employment, an action for the failure to pay maintenance and cure primarily sounds in tort. In *Cortes, supra*, this Court held that when a seaman sustains damages or a "personal injury" as the result of his employer's failure to provide maintenance and cure, he has an action to recover provable damages for that "injury" under the Jones Act, 46 U.S.C. §688. *Vaughan* extended that recovery to include attorney's fees — no more. This Court should accept *certiorari* as *Vaughan* and *Miles* have limited damages for failure to pay maintenance and cure to attorney's fees and compensatory damages.

II. IF PUNITIVE DAMAGES ARE POTENTIALLY RECOVERABLE AS A MATTER OF LAW, IN THIS INSTANCE, PLAINTIFF PRESENTED INSUFFICIENT EVIDENCE TO ESTABLISH THAT IBC'S CONDUCT WAS OF A NATURE SUFFICIENT TO SUPPORT AN AWARD OF PUNITIVE DAMAGES.

Although there was considerable disagreement between the Justices of the Court concerning the scope of due process in *TXO Production Corp. v. Alliance Resources Corp.*, ____ U.S. ____, 113 S.Ct. 2711 (1993), it appears all members of this Court agree that procedural due process requires judicial review to assure there was "sufficiency of the evidence" to sustain the jury verdict. *Id.* at ____, 113 S.Ct. at 2727 (Scalia, J., joined by Thomas, J. concurring). In the instant case, both that review and the evidence were lacking.

In those courts which have held punitive damages are available for failure to provide maintenance and cure, there is a requirement of "egregious shipowner conduct exhibiting wanton and intentional disregard of a seaman's rights to justify an award of punitive damages." *Harper v. Zapata Off-Shore Co.*, 741 F.2d 87 (5th Cir. 1984). The Fifth Circuit held that "the willful, wanton and callous conduct required to ground an award of punitive damages requires an element of bad faith." *Id.* at 90. The "bad faith" requirement was reiterated in *Tullos v. Resource Drilling, Inc.*, 750 F.2d 380 (5th Cir. 1985).

A shipowner cannot be subjected to punitive damages if its reasons for not providing maintenance and cure are reasonable. In *McWilliams v. Texaco, Inc.*, 781 F.2d 514 (5th Cir. 1986), the Fifth Circuit found Texaco's administrative policy requiring seamen to submit medical reports to document claims for maintenance and cure was not callous or recalcitrant and would not support an award of punitive damages.

Here, IBC at times refused to provide maintenance for certain periods because Jordan had not submitted medical reports to support his claim. As *McWilliams* holds, such a policy is justified and reasonable and should not support a finding of arbitrary and capricious behavior by the employer. Alternatively, even if requiring a seaman to submit medical reports to support his claim for maintenance is found to be unreasonable by this Court, IBC should not be penalized for following the policy ap-

proved by the Fifth Circuit in *McWilliams, supra.* In *Harper, supra,* the Fifth Circuit declined to impute bad faith to Zapata for paying what it considered to be the legal minimum rate of maintenance. Here, IBC relied on a policy bearing judicial imprimatur.

Even if IBC's policy is found to be unreasonable, IBC should not be liable for punitive damages unless it was found to be in bad faith, a finding which the evidence in this case does not support. The Fifth Circuit enunciated an escalating scale of conduct in *Morales v. Garijak, Inc.*, 829 F.2d 1355 (5th Cir. 1987):

> [A] shipowner who is in fact liable for maintenance and cure, but who has been reasonable in denying liability, may be held liable only for the amount of maintenance and cure. If the shipowner has refused to pay without reasonable defense, he becomes liable in addition for compensatory damages. If the owner not only lacks a reasonable defense but has exhibited callousness and indiffernece to the seaman's plight, he becomes liable for punitive damages and attorney's fees as well.

Id. at 1358.

While IBC contends punitive damages are not available as a matter of law, if this Court holds such damages are available, IBC submits the escalating scale set forth in *Morales* is the gauge against which a shipowner's conduct must be judged. The Fifth Circuit noted that on review, the jury award must be upheld if supported by *substantial evidence. Id.* at 1360. The award of punitive damages there was reversed.

In the instant case, the Louisiana First Circuit cited the *Morales* escalating scale, but applied the scale improperly to the evidence produced at trial. (App. A, p. 30a). Jordan failed to put on sufficient evidence to support a jury award of punitive damages. There was no testimony as to IBC's reasons for not providing maintenance and cure. The finding that IBC was arbitrary and capricious is not based

on "substantial evidence" as required by *Morales,* but can be based only on speculation, and must be reversed. At most, Jordan merely showed maintenance and cure had not been provided, or had not been paid timely.This alone does not support an award of punitive damages.

In *Ober v. Penrod Drilling Co.,* 726 F.2d 1035 (5th Cir. 1984), the Fifth Circuit held attorney's fees and damages for mental anguish were not available based solely on the employer's failure to pay maintenance and cure *timely.* The court held the law "do[es] not support such an award on the basis of untimely payment alone." *Id.* at 1037-38 n. 4 (citing *Vaughan* and *Blanchard v. Cheramie,* 485 F.2d 328l (5th Cir. 1973)).

Likewise, Jordan did not overcome his burden to establish that the conduct of IBC regarding maintenance and cure was arbitrary and capricious. In *Richard v. Bauer Dredging Co. Inc.,* 433 F.2d 954 (5th Cir. 1970), the Fifth Circuit overturned the district court's award of attorney fees, holding that "[t]he record simply fails to demonstrate that arbitrary or capricious conduct prerequisite to the allowance of attorney's fees in such cases." *Id.* at 955. See also *Lirette v. K&B Boat Rentals, Inc.,* 579 F.2d 968, 969 (5th Cir. 1978); *Kratzer v. Capital Marine Supply, Inc.,* 490 F.Supp. 222 (M.D. La. 1980), *aff'd,* 645 F.2d 477 (5th Cir. 1981). *Lirette* involved a seaman whose maintenance was terminated when he failed to return to work after a doctor advised him he could do so. The trial court granted plaintiff's motion for summary judgment, finding it uncontroverted that plaintiff had not reached maximum medical improvement, and thus was due maintenance and cure. However, damages and attorney's fees were not allowed because the court found the record contained insufficient evidence to show arbitrary or unreasonble conduct by K & B. *Lirette,* 579 F.2d at 969. The same result should occur here.

Even the cases which allow such require evidence in the record of the nature and motivation behind the defendant's conduct for an award of punitive damages or attorney's fees to stand. Plaintiff has the burden of proof on

this issue. Defendant need not justify or explain its conduct until plaintiff has produced evidence that the conduct of defendant supports an award of punitive damages or attorney's fees.

To recover punitive damages, the plaintiff must show more than just a failure to pay; he must prove an unreasonable failure to pay, coupled with bad faith. Where, as here, the shipowner and the seaman's union herein have arranged for the Seafarer's Medical Plan to pay the cure expenses of an injured seaman, the shipowner has discharged its duty with regard to cure. *Al-Zawkari v. American S.S. Co.*, 871 F.2d 585 (6th Cir. 1989). Certainly, IBC's reliance on the seaman's own union to fulfill its contractual obligations under the collective bargaining agreement should not be considered "bad faith" a *fortiori.*

This Court should accept *certiorari* because there was such a deficiency of evidence to support a punitive damage award as to amount to a denial of due process.

III. THE AWARD OF AND THE AMOUNT OF PUNITIVE DAMAGES IN THIS INSTANCE VIOLATE IBC'S RIGHT TO PROCEDURAL DUE PROCESS OF LAW UNDER THE FIFTH AND FOURTEENTH AMENDMENTS OF THE CONSTITUTION OF THE UNITED STATES.[3]

In *Haslip* and *TXO,* this Court reviewed the constitutionality of the award and assessment of punitive damages by state court juries pursuant to the common law. *Haslip* and *TXO* were the culmination of prior decisions of this Court of the past eighty years. Yet, this Court has not addressed the constitutionality of punitive damages under

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[3] The Fifth Amendment is implicated because the conduct warranting the imposition and the calculation of the amount of punitive damages for delayed payment of maintenance and cure are governed by federal admiralty law. The Fourteenth Amendment is implicated because it is a state jury and state court in this instance acting unconstitutionally. See *e.g., Johnson v. Hugo's Skateway,* 974 F.2d 1408, 1411 n. 1 (4th Cir. 1992) (*en banc*) (Fifth Amendment govened constitutionality of jury's assessment and federal court's review because those entities deprived the defendant of procedural due process.)

the admiralty and maritime law. Except for Justice Stewart's dissent in *Vaughan, supra*, the sole decision rendered by the Court concerning punitive damages in this realm was decided over one and one-half centuries ago in *The AMIABLE NANCY*, 16 U.S. (6 Wheat.) 546, 4 L.Ed. 456 (1818). In the *AMIABLE NANCY*, the crew of the SPIDER committed trespass against the AMIABLE NANCY, which brought a libel against the owners of the SPIDER. The Court agreed the AMIABLE NANCY was entitled to compensation from the owners and noted in *obiter dicta*, "If this were a suit against the original wrongdoers, it might be proper to go yet further and visit upon them in the shape of exemplary damages." *Id.* at 558. The Court, however, refused to hold the innocent owners, the only defendants before the Court, liable for such damages. *Id.* at 559.

Since 1818 the Court has not spoken on the availability or award of punitive damages under the maritime law. IBC submits this Court should grant *certiorari* to set forth the applicable constitutional analysis of punitive damages under the general maritime law, if such are available at all.

Due process essentially concerns the fundamental fairness of governmental activity. *Quill Corp. v. North Dakota*, 112 S.Ct. 1904, 1913, 119 L.Ed.2d 91 (1992). It requires that parties in civil litigation not be subject to arbitrary and capricious treatment by juries or courts. See *Daniels v. Williams*, 474 U.S. 337, 106 S.Ct. 662 (1986).

An award of punitive damages and the amount thereof must be supported by a preponderance of the evidence. See *Haslip*, 499 U.S. at 23 n. 11, 111 S.Ct. at 1046 n. 11 (1991). There is no rational basis, upon the evidence in this trial, to support a punitive damage verdict of $1 million as awarded by the jury, $500,000.00 as found by the three judge majority of the appellate court or even $150,000.00 as suggested by one judge, concurring in part and dissenting in part.

The evidence, or rather lack of evidence, in this case

pertaining to the award and amount of punitive damages readily is apparent from a review of the appellate court's opinion. The Louisiana First Circuit lists four factors relevant in determining the amount of punitive damages to be awarded. (App. A, p. 32a). These factors, their application and IBC's position are as follows:

1. "The nature and extent of the harm to the plaintiff." The First Circuit commented: "Jordan was unable to meet his daily living expenses or to get medical care as a result of IBC's non-payment of maintenance and cure." (App. A, p. 33a). Although this may be evidence of the potential harm to plaintiff, there was no evidence of the extent of the harm, if any. Other than the payments themselves, the plaintiff did not request any compensatory damages for the alleged failure to pay maintenance and cure timely. The extent of the alleged harm to plaintiff is unknown. The jury may have found the failure to receive maintenance and cure in fact did not result in any compensable harm to plaintiff. Of course, the jury was not charged to consider the nature and extent of the alleged harm to the plaintiff and accordingly this Court must presume the jury did not consider such.

2. "The wealth or financial situation of the defendant." The First Circuit correctly observed: "There is no evidence in the record pertaining to the financial status of IBC." (App. A., p. 33a). Obviously, the jury's verdict was not based on this factor. Interestingly, this is the only factor suggested by the trial court as guidance for the jury in "assessing the amount of the punitive damages." (R. Vol. 4, p. 1031, reproduced in Appendix J, p. 102a.) However, that instruction was meaningless, as there was no evidence concerning the financial status of the defendant.

3. "The character of the conduct involved." The First Circuit indicated: "IBC's conduct in delaying and/or refusing payments to Jordan was arbitrary and capricious." (App. A, p. 33a). This adds nothing to the discussion because it is merely the minimum level of *conduct* necessary for a jury properly to assess punitive damages

according to some courts. It is of no assistance in assessing the *amount* of punitive damages. Moreover, IBC submits there is insufficient evidence to establish arbitrary and capricious conduct, as discussed previously.

4. "The extent to which such conduct offends a sense of justice and propriety." The First Circuit commented: "IBC's choice to save a relatively small amount of money rather than fulfill its obligation to care for one of its employees injured on its vessel offends a sense of justice." (App. A, p. 33a). There is simply no evidence to support that contention. By contract, plaintiff's cure obligation was supposed to be satisfied by his own union. It is irrational to contend a shipowner should be subjected to punitive damages because plaintiff's own union does not make timely payments as required by the collective bargaining agreement between the union and IBC. There is no evidence IBC's decision was motivated by saving $1,816.00 in maintenance.

Moreover, it is inconsistent to conclude the $8.00 per day maintenance rate in the collective bargaining agreement with Jordan's union was enforceable, as the First Circuit correctly did, on one hand, but then to find IBC's obviously *reasonable* reliance on the same union to perform its obligations under the same collective bargaining agreement in terms of managing cure payments to be arbitrary and capricious, so as to subject IBC to punitive damages in any amount.

Additionally, it is impossible to know to what extent the jury's award of punitive damages was influenced by the district court's holding that IBC's payment of maintenance at the contractual rate of $8.00 per day was inappropriate. The district court found maintenance was owed at the rate of $17.00 per day, over twice the rate at which it was paid. From the evidence in the record, it is impossible to determine what effect this holding had on the jury's award of punitive damages.

* * *

In summary, there was no probative evidence to provide any basis to support a judgment for punitive damages

in any amount. The Louisiana First Circuit held "[u]nder the facts and circumstances of this case, a punitive damage award of $1 million is a clear abuse of the jury's much discretion." (App. A, p. 33a). It would seem more accurate to say the award was the result of the jury's unbridled discretion in the absence of any guidance and evidence.

Affirmance of the punitive damage award in this instance condones an irrational verdict because there is no evidence as to why a verdict in this instance should be $1,000,000.00 or $500,000.00 or even $150,000.00 as suggested by the dissent of Judge Gonzales. There was *no evidence* of the financial status of IBC, the *only* factor the trial court instructed the jury to consider in determining the *amount* of punitive damages.

The Court should accept *certiorari* to ensure IBC receives due process.

IV. THE ASSESSMENT OF AND AMOUNT OF PUNITIVE DAMAGES AWARDED IN THIS INSTANCE VIOLATE DUE PROCESS AND, THEREFORE ARE UNCONSTITUTIONAL UNDER THE *HASLIP* AND *TXO* DECISIONS.

Between the time IBC appealed and the Louisiana First Circuit rendered its decision, this Court decided *Haslip*. Between the time writs of *certiorari* were filed and denied by a divided panel of the Louisiana Supreme Court, this Court rendered the *TXO* decision.

Although the *Haslip* Court did not conclude "the common-law method for assessing punitive damages is so inherently unfair as to deny due process and be *per se* unconstitutional[,]" *Haslip*, 499 U.S. at 17, 111 S.Ct. at 1043, it emphasized not every award of punitive damages automatically satisfies the concerns of due process. This Court should grant *certiorari*, as IBC has not received due process of law required by this Court in *Haslip* and *TXO*.

In affirming Alabama's method of assessing the amount of punitive damages, this Court in *Haslip*

scrutinized three aspects of that state's jury trial system that potentially offended a defendant's right to due process: (1) instructions given to the jury; (2) post-trial review by the trial court; and (3) post-trial review by the appellate court. *Id.* 20-21, 111 S.Ct. at 1044-45. IBC addresses these issues in order:

1. **The trial court's jury instructions, in this instance, did not provide even the minimum guidance needed in assessing the amount of punitive damages as required by due process and the *Haslip* decision.**

This Court in *Haslip* found the jury charge given by the trial court provided sufficient guidance to assist in rational decision making by the jury. In contrast, the jury instruction given by the district court below could not aid the jury in rational decision making.

The jury charge in *Haslip* and the jury charge in this case diverge dramatically in the guidance provided for fixing the amount of punitive damages. The instruction in *Haslip* charged: "Should you award punitive damages, in fixing the amount, you must take into consideration the character and the degree of the wrong as shown by the evidence and necessity of preventing similar wrong." *Id.* at 6 n. 1, 111 S.Ct. at 1037 n. 1. The only instruction provided by the district court below charged as follows: "In assessing the amount of punitive damages, you may take into account the financial status of the defendant." (R. Vol. 4, p. 1031, App. J, p. 102a.) Of course, as previously discussed and confirmed by the Louisiana First Circuit, there was *no evidence* as to the financial status of the defendant.

Unlike *Haslip,* there was no charge here to consider the character of the wrong, no instruction to consider the degree of the wrong shown by the evidence, and no instruction to take into account the necessity of preventing a similar wrong. In sum, the jury here was directed to look at only one factor, the financial status of the defendant, in calculating the amount of punitive damages, on a record devoid of any evidence as to even that one factor.

The definitional (as opposed to instructional) portion of the jury charge pertaining to punitive damages given by the district court below was as follows:

> Punitive damages are added damages awarded for public service in bringing a wrongdoer to account, as an example to warn and deter others from repeating the same act.
>
> They are never awarded to benefit the injured party or as a matter of right, but rather to punish and to compel the wrongdoer to have due and proper regard for the rights of seamen.

(R. Vol. 4, p. 1030-31, App. J. p. 102a.)

The definition does not *instruct* the jury to consider any of the necessary factors in assessing the *amount* of damages. Moreover, it would be patently improper for the jury to consider the plaintiff's "public service" in bringing a wrongdoer to account in assessing the quantum of punitive damages. If one construes the definitional portion of the punitive damage instruction to be an instruction for assessing the amount, it can fairly be said the jury could have concluded the award of punitive damages essentially was a bounty provided to a plaintiff for bringing a wrongdoer to account. The award would impermissibly reward plaintiff's "good deed," not necessarily deter the defendant.

Therefore, this Court should accept *certiorari* to vindicate IBC's right to due process, as there was no factual or rational basis for the jury to determine the amount of punitive damages, in violation of the *Haslip* decision.

2. **There was no post-verdict review of the award of punitive damages by the trial court to ensure due process of law as required by this Court in *Haslip*.**

A second factor which led this Court to uphold the punitive damage award in *Haslip* was Alabama's established post-trial procedures for scrutinizing punitive awards. These procedures included the trial court's review of

"culpability of the defendant's conduct," the "desirability of discouraging others from similar conduct," the "impact upon the parties" and "other factors, such as the impact on innocent third parties." *Haslip*, 499 U.S. at 20, 111 S.Ct. 1044 (quoting *Hammond v. City of Gadsden*, 493 So.2d 1374 (Ala. 1986)). This Court concluded that "the *Hammond* test ensures meaningful and adequate review by the trial court whenever a jury has fixed the punitive damages." *Id.* at 21, 111 S.Ct. at 1045. Louisiana has *no* established post-trial procedures for scrutinizing punitive damages at the trial level. Certainly no scrutiny was performed in the instant case. This Court should grant *certiorari* to mandate Louisiana's compliance with due process as required by *Haslip*.

3. There was no appellate review of the constitutionality of the punitive damage award in this instance.

The three judge majority of the Louisiana First Circuit held, "the issue of constitutional excessiveness of the punitive damage award is properly before this court.We need not address this constitutional issue; however, because we find the award excessive under Louisiana law." (App. A, p. 32a).

While IBC agrees with the appellate court holding that the $1 million dollar punitive damages award was a clear abuse of the jury's discretion and excessive under Louisiana law, the fact that it was excessive under Louisiana law does not address whether *any* award of punitive damages in this case is constitutionally excessive or impermissible under the due process clauses of the United States Constitution.

V. IBC'S RIGHT TO DUE PROCESS WAS FURTHER COMPROMISED BY PLAINTIFF FRATERNIZING WITH THE JURY DURING THE TRIAL, COMPOUNDED BY PLAINTIFF'S TRIAL COUNSEL TAKING THE STAND. DEFENDANT'S BURDEN OF PROOF, *I.E.*, TO SHOW THAT IT IS "*IMPOSSIBLE*"

FOR THE JURY TO REACH A PROPER JUDGMENT FOLLOWING THE FRATERNIZATION, AMOUNTS TO A DENIAL OF DUE PROCESS.

In *TXO,* the Court was divided over the appropriate method to ascertain a constitutionally improper punitive damage award. A comparison of the plurality opinion and the dissenting opinion, reveals seven justices agreed a jury verdict awarding punitive damages influenced by prejudice against a defendant is unconstitutional. Compare *TXO,* ____ U.S. at ____, 113 S.Ct. at 2714, with *Id.* at ____, 113 S.Ct. at 2729. (O'Connor, J., joined by White and Souter, JJ. dissenting). IBC submits the conduct of Jordan and his counsel (not to mention the district court directing a verdict that maintenance be paid at over twice the contractual rate paid by IBC, which was reversed on appeal) prejudiced the jury against IBC, warranting *certiorari.*

It is undisputed the trial court admonished the jurors not to fraternize with either party or their counsel. Nevertheless, plaintiff and several of the jurors conversed during the trial. (R. Vol. 3, pp. 670-675, App. I, pp. 97a - 100a.) It is hard to imagine an action with more potential for bringing disrepute to the entire judicial system than a party conversing with jurors during trial. The trial judge, in an *ex parte* hearing, concluded the jurors and the plaintiff were engaged in pleasantries, therefore, no harm was done. This does not resolve the matter. As cogently stated in one of the dissents in the circuit court, "It is obvious, however, that when a party converses with several of the jurors during the course of trial, he establishes a rapport with those jurors which could subliminally prejudice those jurors in his favor." (App. A, p. 37a) (Shortess, J., joined by Gonzales, J. dissenting). That the jurors and plaintiff were discussing plaintiff's family is exactly the type of contact that could cause subliminal prejudice. IBC did not engage the jury in "pleasantries" nor did the jury engage IBC in pleasantries during the trial.

According to the three judge majority of the Louisiana First Circuit, to obtain a mistrial, IBC's *burden* was

to show that "it was '*impossible* to reach a proper judgment' in the case." (App. A, p. 14a). This burden for a mistrial, which should not be on the innocent party in the first place, virtually is insurmountable. Juxtaposing the fact that IBC was assessed punitive damages, an essentially criminal sanction based on less than a preponderance of the evidence, with IBC's insurmountable burden of showing that it was *impossible* for the jury to reach a proper judgment following plaintiff's secret conversation with the jury, perhaps, highlights the absurdity of the "impossible" standard.

Two of the Louisiana First Circuit judges felt plaintiff's attorney testifying, in concert with plaintiff and the jurors' misconduct, required a mistrial, even if it were impossible for the defendant to prove prejudice. (App. A, p. 37a) (Shortess, J., joined by Gonzales, J. dissenting). They correctly felt these actions "effectively denied the defendant a fair trial." (*Id.*) Combining this with the majority opinion holding that the jury's punitive damage verdict was "a clear abuse of the jury's much discretion," reveals the actions of plaintiff and plaintiff's counsel caused passion and prejudice in the jury, resulting in the unreasonable verdict.

When a party intentionally violates the judge's order and confers with the jury — unquestionably misconduct by the party and by the jury — the better rule would require *the party at fault* to bear a heavy burden to show that the innocent party, who did no wrong, will receive a fair trial. It makes no sense to *require the innocent party to prove* it was "impossible" for it to get a fair trial due to the other party's (and jury's) unquestionably improper acts.

The Court should accept *certiorari* because as a matter of law, when *parties* are admonished not to communicate with the jury during the trial and one party chooses to do so, that action brings such disrepute to the entire legal system, a mistrial (and probably contempt sanctions) is required. IBC has been denied due process in this instance.

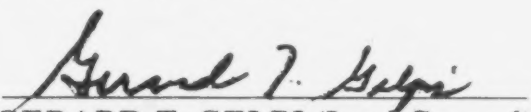
VI. THE DISTRICT COURT AND THE COURT OF APPEAL ERRED AS A MATTER OF LAW IN ALLOWING JORDAN DOUBLE RECOVERY FOR BOTH MENTAL PAIN AND SUFFERING AND MENTAL ANGUISH.

The jury's answer to special interrogatories indicates Jordan suffered damages of $125,000.00 for mental pain and suffering and $125,000.00 for mental anguish. The trial court erred as a matter of law in entering judgment awarding both damages, as "mental anguish" is the same as "mental pain and suffering." Further a review of the court's instructions confirm there is no distinction. (R. Vol. 4, pp. 1024 and 1038, Appendix K, p. 104a. and L, p. 105a, respectively.) Thus, plaintiff received double recovery.

CONCLUSION

For the foregoing reasons, IBC respectfully requests the Court grant *certiorari*.

Respectfully submitted:



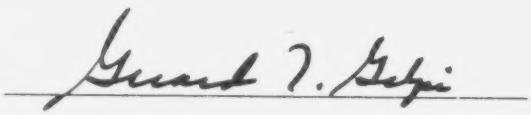
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CERTIFICATE OF SERVICE

I do hereby certify that on this 8th day of December, 1993, a copy of the foregoing pleading has been served upon all counsel for all parties to this proceeding, by mailing same United States mail, properly addressed, and first class postage prepaid.



Supreme Court, U.S.
FILED
DEC 13 1993
OFFICE OF THE CLERK

93-929
NO.

In the
Supreme Court of the United States

OCTOBER TERM, 1993

INTERCONTINENTAL BULKTANK CORPORATION
Petitioner

VERSUS

JOHN E. JORDAN
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE LOUISIANA COURT OF APPEAL
FOR THE FIRST CIRCUIT

APPENDIX

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APPENDIX A

JOHN E. JORDAN

VERSUS

INTERCONTINENTAL BULKTANK CORPORATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER CA 90 2146

FILED
FEB 19, 1993

ON APPEAL FROM THE EIGHTEENTH JUDICIAL DISTRICT COURT, PARISH OF WEST BATON ROUGE, STATE OF LOUISIANA, NUMBER 21,033, DIVISION "D", HONORABLE JACK T. MARIONNEAUX, JUDGE PRESIDING.

BEFORE: SHORTESS, CARTER, CRAIN, GONZALES
AND CHIASSON, JJ.

CRAIN, Judge.

This action is a suit in admiralty to recover compensatory and punitive damages and maintenance and cure for an injury sustained by the plaintiff seaman on board the defendant's vessel. The trial judge granted plaintiff's motion for a directed verdict on the issues of maintenance and cure. The trial jury found for the plaintiff on his Jones Act (46 U.S.C. §688) and general maritime tort claims and awarded plaintiff $650,000.00 in compensatory damages. The jury also awarded $1,000,000.00 in punitive damages for arbitrary and capricious failure to pay maintenance and cure. The trial court rendered judgment according to the directed verdict and the jury's verdict. The defendant took this suspensive appeal.

FACTS

Plaintiff, John Jordan, was employed by defendant, Intercontinental Bulktank Corporation (IBC), as chief pumpman on the S/S Overseas Alaska. On June 2, 1988, Jordan was ordered by the chief engineer and chief mate of the vessel to construct a support bracket for an air conditioning unit. Jordan needed an acetylene torch to do the work and went down to the engine room to get an acetylene bottle. Jordan claimed John Wayne Labure, first assistant to the chief engineer, told him to put the bottle on his shoulder and carry it up on deck. Although Labure denied giving this order, he testified this was the way these bottle were usually moved. Labure testified that the ship was "fully crewed" at the time and Jordan could have gotten help had he asked for it.

Robert Borison, a safety consultant, testified the acetylene bottle weighed approximately 79 pounds and contained a highly flammable gas. After inspecting the ship, Borison testified as follows:

Q How do you understand that the acetylene bottle was being transported at the time of Mr. Jordan's injury?

A I understand he was instructed to lift it up, place it on his shoulder and carry it.

Q Is that a proper way of moving an acetylene bottle, in your opinion?

A No, sir.

Q What are the hazards of moving acetylene in that manner?

A Aside from the physical injuries sustained, or could be sustained by the person carrying it, I think the overall danger to the vessel and/or the people involved in working in that vessel overshadows any personal danger to an individual. For example, if that man would have fallen and dropped the bottle it may have exploded thereby damaging the ship, sinking the ship at sea. It could have injured no telling how many people on that vessel, particularly where he was carrying it. He was asked to carry it up a flight of stairs, across an elevated walkway overlooking the engine compartment, approximately twenty feet above the top of the engine compartment and then up a very large and steep sixty percent grade stairway. All of these combined, in my opinion, placed the defendant and the vessel in extreme danger. It's very fortunate he didn't drop the bottle.

Jordan, who was 53 years old and weighed approximately 120 pounds, lifted the 79-pound bottle, placed it on his shoulder, climbed three flights of stairs, and walked through a watertight door onto the main deck of the vessel. As he bent over to put the acetylene bottle down, he felt pain in his lower back. Jordan was unable to keep working. He went to his room and remained there until the ship docked two days later, Jordan went ashore and was examined at the St. James Parish Hospital and released. After spending the night in a motel, Jordan returned to the

ship to collect his wages and caught a flight to his home in Mobile, Alabama.

Jordan was seen by Dr. Michael Ledet in Mobile on June 13, 1988. He complained of severe lower back pain that radiated down his left leg. Dr. Ledet referred Jordan to Dr. Norman Lichtenfeld who admitted him to Providence Hospital on June 15, 1988. Dr. Lichtenfeld diagnosed minimal bulging of the L4-5 disc and narrowing of the L5-S1 disc space. He found no evidence of disc herniation. Following traction and physical therapy, Jordan was released from the hospital on June 25, 1988.

On July 21, 1988, Jordan consulted Dr. Kenneth Vogel, a neurosurgeon, in New Orleans, Louisiana. A CAT scan showed disc herniation with bilateral stenosis at the L5-S1 level. Dr. Vogel performed a microsurgical laminectomy on Jordan on August 29, 1988, at Mercy Hospital. Dr. Vogel determined that Jordan would not reach maximum medical improvement until one year after surgery and concluded Jordan would have a 10 to 15 percent medical impairment of the body as a whole. Dr. Vogel also advised Jordan to avoid lifting, pushing, or pulling weights greater than 50 pounds on a permanent basis. Dr. Vogel last saw Jordan on December 13, 1988.

Jordan's pain continued after the surgery. He consulted Dr. John Watermeier, an orthopaedic surgeon, on March 14, 1989. Dr. Watermeier diagnosed Jordan as having lumbar disc syndrome. After numerous visits, Dr. Watermeier recommended that Jordan undergo a CAT scan and an MRI to determine the exact cause of the pain. Dr. Watermeier testified that if Jordan needed additional

surgery it would cost between $15,000.00 and $20,000.00. As of the time of trial (June 15, 1990), Jordan had not undergone these tests because he did not have the money to pay for them. Dr. Watermeier last saw Jordan on November 22, 1989, and testified at that time Jordan's condition had not improved. Dr. Watermeier agreed with Dr. Vogel's assessment that Jordan should avoid lifting, pushing or pulling weight greater than 50 pounds and suffered a 10 to 15 percent disability of the body as a whole.

IBC had Jordan examined by Dr. Randall Lea in Baton Rouge, Louisiana, on February 6, 1990. Dr. Lea, an orthopaedic surgeon, concluded that Jordan suffers from "failed back syndrome" which he explained as continued pain after surgery. This pain, he indicated, could be caused by further disc herniation that might require additional surgery. Dr. Lea testified that if Jordan underwent additional surgery, he would not reach "maximum medical cure" until one year after surgery. Dr. Lea recommended that Jordan undergo an MRI to determine the cause of his pain. Dr. Lea stated that Jordan would not be able to return to his old job and should be relegated to sedentary or light work, reagardless of whether further surgery was required.

Donald Wooddall, an expert in vocational rehabilitation and training, testified Jordan's age, education, and medical condition would make it very difficult for Jordan to find employment of a sedentary nature. However, Nancy Favaloro, IBC's expert in vocational rehabilitation, disagreed with this assessment and testified there were job opportunities available for Jordan.

Jordan testified he continues to experience pain in his lower back and is unable to work. Prolonged standing or sitting causes the pain to intensify. Jordan maintains he can no longer hunt and fish and is relegated to watching television in his rented trailer.[1] Jordan claims that he has delayed getting medical treatment, medication, and the additional testing recommended by Drs. Watermeier and Lea because he does not have any money. Jordan testified the maintenance and cure he received from IBC was not enough to cover his medical expenses or his living expenses. Jordan has been forced to borrow money for food and rent. He claims that IBC has delayed maintenance payments for periods of from 3 to 6 months.

Terry Bell, one of Jordan's attorneys, testified that he sent a November 20, 1989, letter to IBC's attorneys demanding maintenance and cure. The trial court, over IBC's objection, admitted this letter into evidence. The letter provides, in pertinent part, as follows:

> As I promised last week, you will find enclosed a revised medical tabulation showing amounts paid by myself, my co-counsel, and the Welfare Plan. This tabulation also shows the total amount of medical expenses incurred by Mr. Jordan. On the second page is a recapitulation showing amounts still owed to various providers as well as the amounts paid by the Welfare Plan. Some of these accounts, particularly that of Providence Hospital, are quite old.
>
> Despite the provisions of the contract that

[1] Jordan now resides in Port Allen, Louisiana, with his adult son.

> the Welfare Plan is obligated to pay medical expenses, as you are aware, that does not obviate the requirement that the employer pay cure. I have attached supporting documentation to the Tabulation and suggest that all amounts be paid within three weeks of the date of this letter. Otherwise, I believe we will have a good claim for punitive damages in this case which would be tried to a receptive judge.
>
> Finally, the medical which was given to you last week, particularly that from Dr. Watermeier, indicate that Mr. Jordan has not reached maximum medical cure as of this date. Accordingly, maintenance should have been paid through the present date. I would appreciate it if you would rectify this situation.

The attachments to the letter show that as of November 20, 1989, Jordan had $6,132.70 in unpaid medical bills.[2] Some of the unpaid bills were over a year old. Bell also wrote to IBC's attorneys on March 15, 1990, and again asked that maintenance and cure payments be made. This letter was admitted into evidence over IBC's objection, but it is not in the record on appeal.

At the close of the evidence, the trial judge granted Jordan's motion for a directed verdict on the issue of whether IBC owed Jordan maintenance and cure. The trial judge held IBC owed $2,529.20 in unpaid cure. The trial judge awarded maintenance due between June 2,

---

[2] As of the time of trial, Jordan's outstanding medical bills had been reduced to $2,529.20, by payments from the Seafarers Welfare Plan.

1988, and June 16, 1990, totaling $12,665.00 subject to a credit in favor of IBC in the amount of $4,144.00 for amounts already paid. Maintenance was calculated at $17.00 a day despite the fact that the collective bargaining agreement between Jordan's union and IBC called for maintenance payments at $8.00 a day.

The jury held as follows: S/S Overseas Alaska was "unseaworthy" on June 2, 1988; IBC was negligent, and that negligence was a cause of Jordan's injury; and Jordan was not negligent. The jury awarded $650,000.00 in compensatory damages itemized as follows:

TOTAL WAGE LOSS	$250,000.00
MENTAL ANGUISH	$125,000.00
PAST AND FUTURE PAIN AND SUFFERING	$150,000.00
PAST AND FUTURE MENTAL PAIN AND SUFFERING	$125,000.00

The jury also found IBC arbitrary and capricious in failing to timely pay maintenance and cure to Jordan and awarded $1,000,000.00 in punitive damages against IBC. IBC was ordered to pay interest on the awards for compensatory and punitive damages from the date of judicial demand, July 7, 1988. IBC's motion for a new trial was denied. IBC then took this suspensive appeal.

JORDAN'S ATTORNEY AS A WITNESS

(Assignment of error 1a)

IBC contends the trial court erred by allowing one of

Jordan's attorneys, Terry Bell, to testify at trial.

To prove that numerous attempts were made to collect maintenance (living expenses) and cure (medical expenses) from IBC, Jordan called IBC's designated corporate representative, John Wayne Labure, as a witness. Labure's testimony showed he was not an officer of IBC, had never visited IBC's headquarters in New York City, knew nothing about the handling of this case, knew nothing about IBC's procedures for handling maintenance and cure claims, and did not know why he had been designated IBC's corporate representative. Jordan then attempted to call one of IBC's attorneys, Ira Rosenzweig, as a witness, and IBC objected. The trial judge sustained IBC's objection to Rosenzweig being called as a witness. Jordan, over IBC's objection, then called Terry Bell, one of his attorneys, as a witness. In overruling IBC's objection, the trial judge reasoned as follows:

> THE COURT: — and I'm not — going to tell you right now, I'm not going to prevent him from putting those letters in evidence. If you don't want the man to testify, stipulate that the letters were sent or got to you or received or whatever. If you don't, I'm going to let him testify.
>
> MR. O'KEEFE: Your Honor, I —
>
> THE COURT: You have — you have a witness over here who's a corporate representative, who knows nothing about it and I think he has a right to put these letters in evidence. I'm listening. I know what this case is about. I've been here for I don't know, a year and a half, two

> years on this case since it started and he's got a right to get those letters into evidence and I think the easiest way without having the problem is to stipulate. If you don't want to do that, I'm going to let him testify; very simple.

The court also overruled IBC's motion for a mistrial and a motion to have Bell disqualified from representing Jordan.

In support of its assignment of error, IBC cites Rule 3.7 of the Louisiana Supreme Court Rules of Professional Conduct which provides as follows:

> (a) A lawyer *shall not act as advocate* at a trial in which the lawyer is likely to be a necessary witness except where:
>
> (1) The testimony relates to an uncontested issue;
>
> (2) The testimony relates to the nature and value of legal services rendered in the case; or
>
> (3) Disqualification of the lawyer would work substantial hardship on the client.
>
> (b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.
>
> (c) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm may be called as a witness other than on behalf of his

> client, he may continue the representation until it is apparent that his testimony is or may be prejudicial to his client.

(emphasis added.)

This rule prohibits attorneys from acting as advocates in trials in which they are likely to be called as witnesses. It does not prohibit attorneys from testifying at a trial about facts essential to the case. Article 601 of the Louisiana Code of Evidence provides as follows: "Every person of proper understanding is competent to be a witness except as otherwise provided by legislation." There is nothing in the Rules of Professional Conduct or the Louisiana Code of Evidence providing that an attorney is not a competent witness in a trial in which he represents a party to the litigation. Bell was properly permitted to testify.[3]

This assignment of error is without merit.

JUROR MISCONDUCT
(Assignment of error 1c)

IBC asserts the trial court erred in not sustaining its motion for a mistrial based on an alleged conversation between one or more of the jurors and Jordan in violation of the judge's pre-trial instructions to the jurors.

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[3] Even if the trial court erred by allowing this testimony, it was harmless error. *See, Deer Slayers v. Louisiana Motel and Investment Corp.*, 434 So.2d 1183 (La.App. 1st Cir.). *writ denied*, 440 So.2d 151 (La. 1983).

On the morning of the second day of trial, defense counsel observed Jordan talking to one or more of the jurors outside the courthouse and informed the court. In denying IBC's motion for a mistrial, the trial judge reasoned as follows:

> THE COURT: ...
>
> I — getting the facts straight for the record — was informed that there was some conversation outside the courthouse this morning or downstairs prior to the courthouse being open. There were three or four jurors out there and the plaintiff and I think the plaintiff's son, if that's who he is, was outside the courthouse. There was some conversation.
>
> And it was reported to me.
>
> I went to the jury in the jury room and asked them what was the confrontation outside the courthouse.
>
> And one juror said he had asked Mr. Jordan if the young man was his son. And he said it was. There were a very few words crossed between them.
>
> And I asked him if this would have any affect — o[n] any of the jurors — if this would have any [e]ffect on their judgment in the case. And the word was "no." And I think that was sufficient.
>
> And I will admonish the jury and I will see about any contempt after this case is over with as

> far as either to the jurors or the plaintiff in this case, but as far as a mistrial is concerned I think that's a bit too harsh a remedy for the situation that occurred. I feel that there is no harm done to either side in the case.
>
> Motion is not granted.

The law applicable to mistrials in civil jury trials is set forth in *Barnes v. Thames*, 578 So.2d 1155, 1161 (La.App. 1st Cir.), *writ denied*, 577 So.2d 1009 (La. 1991), as follows:

> The Louisiana Code of Civil Procedure does not expressly provide for mistrials, and the jurisprudence concerning motions for mistrial in civil cases is limited. Generally, mistrials are properly granted because of some fundamental failure in the proceeding. ... Generally, a motion for mistrial in a civil case should be granted under the following circumstances: (1) when, before the trial ends and the judgment is rendered, the trial judge determines that it is impossible to reach a proper judgment because of some error or irregularity; and (2) where no other remedy would provide relief to the moving party. ...
>
> Motions for mistrial should also be granted upon proof of prejudicial misconduct occurring during a jury trial, which cannot be cured by admonition or instruction. ... Because a mistrial results in the discharge of one jury and the impaneling of another to try the case anew, it is a

> drastic remedy. ... The trial judge is vested with broad discretion to grant a motion for mistrial where no other remedy would afford relief or where circumstances indicate that justice may not be done if the trial continues. ... This court should not distrub the trial court's determination unless there was an abuse of discretion.

(Citations omitted.) A prerequisite for a successful motion for a mistrial in a civil jury case is that "the trial judge determines that it is *impossible* to reach a proper judgment because of some error or irregularity." (Emphasis added.) *Usner v. Strobach,* 591 So.2d 713 (La.App. 1st Cir. 1991), *writ denied,* 592 So.2d 1289 (La. 1992).

The mere violation of a sequestration order does not compel that a mistrial be declared. Although misconduct of jurors may be a cause for granting a mistrial, the misconduct must be such that it is impossible to proceed to a proper judgment. Contact or communication between a juror and a party or counsel during the trial of a civil action may be a sufficient ground for the declaration of a mistrial where it appears that the act or occurrence in question is potentially, or may have been actually, prejudicial to the complaining party. *Searle v. Travelers Insurance Co.,* 557 So.2d 321 (La.App. 4th Cir. 1990). *See also Peters v. Atlanta International Insurance Co.,* 469 So.2d 421 (La.App. 3rd Cir.), *writ denied,* 474 So.2d 949 (La. 1985); *Kollet v. Baggot,* 400 So.2d 1085 (La.App. 1st Cir. 1981).

This court in *Kollet v. Baggot,* 400 So.2d at 1086, stated the following in affirming the trial court's denials of motions for mistrial and new trial based on improper com-

munication between a litigant and a juror:

> It is evident from the record that the persons involved hardly knew each other, that they were never alone during their conversations, and that the two men were able, separately, to confirm each other's recollections of the content of the conversations. *From the record, this court is unable to find anything in those conversations other than ordinary pleasantries.*
>
> The record shows that the trial judge found no misconduct on the part of any juror or any party such as to constitute proof that the jury behaved improperly so that impartial justice was not done.

(Emphasis added.) Given the nature and brevity of the conversation between Jordan and the juror(s), IBC has failed to show that it was "impossible to reach a proper judgment" in this case. The trial court did not abuse its discretion in refusing to grant IBC's motion for a mistrial.

This assignment of error is without merit.

FAILURE TO CONTROL PROCEEDINGS

(Assignment of error 1d)

IBC claims the trial court erred by failing to properly control the proceedings. In addition to the issues discussed in the two previous assignments of error, IBC asserts failure to control the proceedings is evidenced by the:

> failing to sustain defense counsel's repeated objections to questions on letters not in evidence and use of such letters for cross-examination ...;
>
> failing to correct the jury's misimpression regarding the court's ruling on maintenance and cure;
>
> permitting Jordan's counsel, over objection, to distribute and discuss the verdict form, a prerogative customarily reserved to the court.

(Footnote omitted.)

IBC also contends the trial court failed to confine closing arguments within proper bounds. Specifically, IBC claims the trial court erred in allowing Jordan's counsel to make reference to letters and a punitive damage award against the defendant in another case when these facts were not in evidence.

Louisiana Code of Civil Procedure article 1631 provides as follows:

> A. The court has the power to require that the proceedings shall be conducted with dignity and in an orderly and expeditious manner, and *to control the proceedings at the trial, so that justice is done.*
>
> B. The exclusion of witnesses is governed by Louisiana Code of Evidence Article 615.

(Emphasis added.)

The trial judge is vested with broad discretion in con-

ducting trials in a manner which he determines will be conductive to justice. *First National Bank v. Carr,* 572 So.2d 1106 (La.App. 1st Cir. 1990).

The record shows that IBC's counsel made only one objection during Jordan's closing statement. This objection was made after Jordan's counsel referred to letters not in evidence. The trial judge sustained the objection. The trial judge instructed the jury both before and after closing arguments that arguments of counsel are not evidence. IBC made no objection to statements by Jordan's counsel regarding the punitive damage award in the other case. Failure to make a timely objection to opposing counsel's closing remarks constitutes waiver of the right to complain on appeal. *Ogletree v. Willis-Knighton Memorial Hospital,* 530 So.2d 1175 (La. App. 2d Cir.), *writ denied,* 532 So.2d 133 (La. 1988); *Brumfield v. Brumfield,* 477 So.2d 1161 (La.App. 1st Cir.), *writ denied,* 479 So.2d 922 (La. 1985).

This assignment of error is without merit.

REFUSAL TO LET EXPERT TESTIFY
(Assignment of error 2)

IBC asserts the trial court erred by excluding the testimony of its expert economist, Dan Cliffe.

IBC had planned to call Dr. Kenneth Boudreaux to testify as an expert economist and listed him as a witness in answers to Jordan's interrogatories. Just before trial, Dr. Boudreaux was called out of the country on business. IBC sought to substitute Dan Cliffe as its expert economists. He was not listed in answers to Jordan's

interrogatories. IBC contended Cliffe assisted in preparing the reports from which Dr. Boudreaux was to testify and Jordan would not be prejudiced by Cliffe's testimony. Jordan's attorneys claimed Cliffe should not be allowed to give his opinion as to Dr. Boudreaux's reports. They also objected on the ground that they were not familiar with Cliffe's qualifications; however, one of Jordan's attorneys admitted he had taken Cliffe's testimony in another case. The trial court granted Jordan's motion in limine to exclude Cliffe's testimony.

The reports[4] contain the following sentence: "Please note that this report is produced jointly by Professors James T. Murphy, J. Stewart Wood, Dan M. Cliffe and myself any of whom may testify at trial." These reports were proffered when the trial court refused to allow Cliffe to testify.[5]

La.C.C.P. art. 1428 provides as follows:

> A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows:
>
> (1) A party is under a duty seasonably to supplement his response with respect to any question directly addressed to the identity and location of

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[4] Dr. Boudreaux prepared three reports. Two of the reports contain this language.

[5] Although Cliffe's testimony was not proffered, the parties stipulated that such testimony would follow the reports.

> persons having knowledge of discoverable matters, and the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony.
>
> (2) A party is under a duty seasonably to amend a prior response if he obtains information upon the basis of which he knows that the response was incorrect when made, or he knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.
>
> (3) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.

The trial judge has the discretionary power to allow or disallow the testimony of a witness at trial when a party has failed to satisfy a duty to supplement answers to interrogatories. *Murray v. Sapp*, 573 So.2d 495 (La.App. 1st Cir. 1990).

The trial judge has great discretion in deciding whether to receive or refuse the testimony objected to on the grounds of failure to abide by the statutory mandate, but any doubt must be resolved in favor of receiving the testimony. When a party has not satisfied the technicality of supplementing responses to interrogatories, the reviewing court can look to the record for a willful or negligent failure to disclose names of witnesses in determining

whether the trial judge abused his discretion. *Abdon Callais Boat Rentals v. Louisiana Power and Light Co.*, 555 So.2d 568 (La.App. 1st Cir. 1989), *writ denied*, 558 So.2d 583 (La. 1990). The power to disallow the testimony should be exercised only when the ends of justice dictate the exclusion of the testimony. *Bush v. Winn Dixie of Louisiana*, 573 So.2d 508 (La.App. 4th Cir. 1990), *writ denied*, 578 So.2d 930 (La. 1991).

The following factors are pertinent in determining whether the trial court abused its discretion: (1) the reason IBC did not list Cliffe in its answers to interrogatories was because it thought Dr. Boudreaux would be available to testify; (2) Cliffe's testimony would have been based on the same reports as Boudreaux's; (3) one of Jordan's counsel was familiar with Cliffe's qualifications; and (4) IBC was highly prejudiced by not having an economist to counter the testimony of Jordan's economist.

After considering these factors, we conclude the trial court abused its discretion in excluding the testimony of Cliffe. This error interdicted the trial court's judgment on the award for lost wages. None of the other issues in this case were affected by the exclusion of this testimony.

Because Louisiana appellate courts have jurisdiction over the facts in a civil case, such a prejudicial error does not require a remand. La.Const. of 1974, art. V. § 10; La.C.C.P. art. 2164. Ordinarily, trial court findings of fact are reviewed on appeal under the manifest error (clearly wrong) standard (*Arceneaux v. Domingue*, 365 So.2d 1330 (La. 1978)] and trial court quantum awards are reviewed on

appeal under the abuse of discretion standard [*Reck v. Stevens*, 373 So.2d 498 (La. 1979)]. However, where one or more trial court errors interdict the trial court's fact finding and/or quantum award process, the manifest error (clearly wrong) standard and/or the abuse of discretion standard are no longer applicable, and, if the record is otherwise complete, the appellate court can make its own independent (*de novo*) review of the record and decide the case. *McLean v. Hunter*, 495 So.2d 1298 (La. 1986); *Picou v. Ferrara*, 483 So.2d 915 (La. 1986); *Suhor v. Gusse*, 388 So.2d 755 (La. 1980); and the cases cited therein. We will make an independent review of the record on the issue of lost wages.[6]

Dr. Boudreaux's January 7, 1990, report computed Jordan's lost income as $142,942.81. To arrive at this figure, Boudreaux first determined that Jordan had an estimated work-life at 8.97 years from the date of the accident. He then estimated Jordan's annual income capacity based on an average of his past income which came to $24,901.35 per year.[7] Boudreaux then added on fringe benefits Jordan would be expected to receive had he not been injured. He then figured the present value of Jordan's future income using a discount rate of 8%, real interest rates of 2.5% to 5.5%, and income growth at a rate of 0%

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[6] One of Dr. Boudreaux's reports computes lost wages based on Jordan's shortened life expectancy. Jordan contracted lung cancer and had a portion of one of his lungs removed. The trial court granted Jordan's motion in limine excluding any evidence dealing with Jordan's cancer or his shortened life expectancy. On appeal no error is assigned for this ruling. Accordingly, we will not review the report that considers a shortened life expectancy in making a determination on the issue of lost wages.

[7] This average was computed using Jordan's 1987 and 1988 tax returns.

to 5% per year. From this data Boudreaux arrived at the $142,942.81 figure for total lost wages. This calculation is based on the premise that Jordan is totally and permanently disabled.

Dr. G. Richard Thompson, plaintiff's expert in economics, also testified about Jordan's lost earning capacity. Dr. Thompson computed the present value of Jordan's lost past and future earnings as being $315,875.00. The only information available to Dr. Thompson when this calculation was made was Jordan's 1987 W-2 forms. Those forms show a 1987 income of $38,179.69; however, Jordan's 1987 tax return, which was not supplied to Dr. Thompson, shows an income of only $28,553.15. When showed this tax return on cross-examination, Dr. Thompson recalculated the value of Jordan's lost earnings as $236,230.00. Dr. Thompson also did not have Jordan's 1988 tax return which shows a pre-accident income of $6,862.05.[8] The testimony of an expert witness is to be received and weighed in the same manner as any other evidence. *Cooper v. Olinde,* 565 So.2d 978 (La. App. 1st Cir.), *writ denied,* 569 So.2d 966 (La. 1990). It is well settled that the weight to be given expert testimony is dependent upon the professional qualifications and experience of the expert and *the facts upon which the opinion is based.* When an expert opinion is based on assumed facts which are not supported by the record in the case, the opinion may be rejected. *Hobgood v. Aucoin,* 558 So.2d 1285 (La.App. 1st Cir.), *affirmed,* 574 So.2d 344 (La. 1990).

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[8] Jordan did not file tax returns in 1984, 1985 and 1986 despite the fact he claimed to have earned $50,000 in 1986. He had no income in 1985 due to the fact he was in prison.

The factual basis for Dr. Thompson's calculations was Jordan's 1987 W-2 form and 1987 income tax return. Dr. Boudreaux had Jordan's tax returns for 1987 and 1988 from which to compute lost earning capacity. Because Boudreaux had more facts about Jordan's finances available to him, we give more weight to his conclusions. We accordingly award Jordan $142,942.81 in lost wages.

VALIDITY OF DIRECTED VERDICT FOR MAINTENANCE AND CURE

(Assignment of error 1b)

IBC contends the trial court erred in granting Jordan's motion for a directed verdict on the issue of maintenance and cure. Specifically, IBC asserts whether a person is entitled to maintenance and cure is a question of fact for the jury to decide, there was insufficient evidence about Jordan's physical condition to support the trial court's finding that Jordan had not reached "maximum medical cure," and the trial court had no authority to set maintenance payments at a rate of $17.00 per day instead of the $8.00 per day called for in the collective bargaining agreement.

A motion for a directed verdict may be granted in a jury trial when, after considering all evidentiary inferences in the light most favorable to the mover's opponent, it is clear that the facts and inferences are so overwhelmingly in favor of the moving party that reasonable men could not arrive at a contrary verdict. La.C.C.P. art. 1810; *Barnes v. Thames,* 578 So.2d at 1162.

The applicable general maritime law on the rights of a seaman to maintenance and cure is well established. When a seaman becomes ill or injured while in the service of his ship, the ship owner must pay him maintenance and cure, whether or not the shipowner was at fault or the ship unseaworthy. This obligation includes paying a subsistence allowance, reimbursing medical expenses actually incurred, and taking all reasonable steps to ensure that the seaman receives proper care and treatment. Maintenance and cure is designed to provide a seaman with food and lodging when he becomes sick or injured; it extends during the period when he is incapacitated to do a seaman's work and contines until he reaches "maximum medical recovery." Ambiguities or doubts in the application of the law of maintenance and cure are resolved in favor of the seaman.*Porche v. Maritime Overseas Corp.*, 550 So.2d 278 (La.App. 4th Cir. 1989).

"Maximum cure" (maximum medical recovery) is achieved when it is probable that further treatment will result in no betterment of the seaman's condition. Where it appears that the condition is incurable or that further treatment will merely relieve pain and suffering and not otherwise improve the physical condition, it is proper to declare the point of maximum medical cure. *Simmons v. Hope Contractors,* 517 So.2d 333 (La.App. 1st Cir. 1987), *writ denied,* 518 So.2d 510 (La. 1988).

IBC introduced no evidence to rebut the evidence showing Jordan (1) was injured while serving on IBC's ship, (2) had surgery to repair a disc, (3) continues to have pain, (4) is unable to return to his old job, and (5) needs additional testing to determine if he continues to have disc

herniation. Nothing in the record shows Jordan reached maximum cure by the date of the trial.

Dr. Lea, who examined Jordan for IBC, testified that Jordan would not reach maximum medical cure until one year after a second surgery if such second surgery is required. Dr. Lea recommended that Jordan undergo further testing to determine the origin of his pain and determine whether additional surgery is needed. Jordan did not have this testing because he did not have the money to pay for it. The facts and inferences are so overwhelmingly in favor of the motion for directed verdict that reasonable men could not arrive at a contrary verdict. Accordingly, the trial judge did not err in granting Jordan's motion for a directed verdict.

Because we conclude Jordan is entitled to continued maintenance, we must determine whether the trial court erred in awarding maintenance at the rate of $17.00 per day instead of the $8.00 per day called for in the collective bargaining agreement.

Article II, Section 13, of the 1987 Standard Tanker Agreement between Seafarers International Union and Contracted Companies provides in pertinent part as follows:

> MAINTENANCE AND CURE. When a member of the Unlicensed Personnel is entitled to maintenance and cure under Maritime Law, he shall be paid maintenance at the rate of eight dollars ($8.00) per day for each day or part thereof of entitlement. The payment due hereunder shall be paid to the man weekly.

The trial court relied on *Barnes v. Andover Co.*, 900 F.2d 630 (3rd Cir. 1990), in holding the contract was unenforceable. The holding in that case provided, in pertinent part, as follows:

> In any event, we conclude that it is inconsistent both with the traditional doctrine of maintenance and with our rejection of preemption of maintenance by the labor laws to hold that the maintenance rate set in the collective bargaining agreement is binding on a seaman who can show higher daily expenses.

(Footnote omitted.) *Barnes,* 900 F.2d at 640. However, *Barnes,* is a minority holding in the federal jurisprudence. The majority of the jurisprudence has taken a contrary view. *Gardiner v. Sea-Land Service,* 786 F.2d 943 (9th Cir.), *cert. denied,* 479 U.S. 924, 107 S.Ct. 331, 93 L.Ed. 2d 303 (1986). *See also Al-Zawkari v. American Steamship Co.*, 871 F.2d 585 (6th Cir. 1989); *Macedo v. F/V Paul & Michelle,* 868 F.2d 519 (1st Cir. 1989). While the United States Fifth Circuit has not decided a case involving this issue, a federal district court in Louisiana, in the case of *Castro v. M/V Ambassador,* 657 F.Supp. 886 (E.D.La. 1987), followed *Gardiner v. Sea Land Services* and the majority view in holding that an injured seaman was bound by the $8.00 maintenance rate provided for in the collective bargaining agreement. The majority view is more persuasive.

The trial court erred in calculating the maintenance award at a rate of $17.00 per day. The trial court determined that Jordan was entitled to 745 days of maintenance.[9]

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[9] $12,665.00 divided by $17.00 = $745.00.

IBC has paid Jordan maintenance for 518 days. Therefore, IBC owed Jordan 227 days of maintenance at a rate of $8.00 per day for a total of $1,816.00. The judgment is amended to reduce it to that amount. The trial court's award of $2,529.20 for unpaid cure is correct and is affirmed.

MENTAL ANGUISH AND MENTAL PAIN AND SUFFERING

(Assignment of error 4)

IBC claims the trial court erred by awarding separate damages for "mental anguish" and "mental pain and suffering." IBC maintains these two items are the same and thus the awards are duplicative.

The verdict form (jury interrogatories) submitted to the jury had blanks for both "mental anguish" and "past and future mental pain and suffering." IBC did not object to the verdict form.

Under La.C.C.P. art. 1793(C) a party is prevented from assigning as error the giving or failure to give a jury instruction without objecting to the instruction. This article has been applied to special interrogatories. *Crawford v. Bon Marche,* 540 So.2d 377 (La.App. 1st Cir. 1989).

This court faced a similar set of facts in *Wisner v. Illinois Central Gulf Railroad,* 537 So.2d 740 (La.App 1st Cir. 1988), *writ denied,* 540 So.2d 342 (La. 1989). The jury interrogatories in that case had separate categories for "past and future mental anguish" and "emotional distress." The jury awarded $600,000.00 for each category. In rejecting a

similar assignment of error, this court stated as follows:

> The defendant cannot now complain of the form of the jury interrogatories unless he objected to them at trial either before or after their submission to the jury. His submission of alternative interrogatories does not constitute an objection. The objection must be specific and allow the trial judge an opportunity to correct the error. The submission of alternative interrogatories does not by itself alert the trial judge that the interrogatories of the other party are in error. The defendant must object to the specific interrogatory he considers duplicative.

537 So.2d at 751. Because IBC did not make an objection, it cannot raise this issue on appeal.

This assignment of error is without merit.

ENTITLEMENT TO PUNITIVE DAMAGES
(Assignment of error 1)

IBC claims the jury erred in finding it arbitrary and capricious in failing to pay maintenance and cure and, as a result, awarding punitive damages.

Louisiana appellate courts have jurisdiction to review questions of law and fact in all civil cases. La.Const. art. 5, §§ 5 and 10. Federal appellate courts have jurisdiction only to review questions of law in civil jury trials. U.S. Const. amend.VII. In federal court, when a civil jury has made factual findings upon correct instructions, the only inquiry on review is whether there was sufficient evidence

to sustain these findings. *Granberry v. O'Barr,* 866 F.2d 112 (5th Cir. 1988); *Nunez v. Superior Oil Co.,* 572 F.2d 1119 (5th Cir. 1978). When a judge has made factual findings, these findings are reviewed under "the clearly erroneous standard." Fed. R.Civ.P. 52(a); *Musial v. A & A Boats,* 696 F.2d 1149 (5th Cir. 1983). In Louisiana, a factual finding is reviewed under the manifestly erroneous-clearly wrong standard, unless the factual finding has been interdicted by error. *Rosell v. Esco,* 549 So.2d 840 (La. 1989). In maritime actions brought in state court, federal substantive law applies; but where the result is not substantially affected, the procedural law of the forum applies. *Lavergne v. Western Co.,* 371 So.2d 807 (La. 1979); *Cason v. Diamond M Drilling Co.,* 436 So.2d 1245 (La.App. 1st Cir.), *writ denied,* 441 So.2d 1221 (La. 1983). Thus, state courts are not required to apply Rule 52(a) (the clearly erroneous standard of review), a rule of *federal* civil procedure, to their own systems for reviewing factual determinations of trial judges. *Icicle Seafoods v. Worthington,* 475 U.S. 709, 106 S.Ct. 1527, 89 L.Ed.2d 739 (1986); *Daigle v. Coastal Marine,* 488 So.2d 679 (La. 1986). State courts apply their own system for reviewing factual determinations of juries in general maritime law cases. *Simmons v. Hope Contractors,* 517 So.2d at 336.

Upon receiving a claim for maintenance and cure, the shipowner need not immediately commence payments; he is entitled to investigate and require corroboration of the claim. If, after investigating, the shipowner unreasonably rejects the claim, when in fact the seaman is due maintenance and cure, the owner becomes liable not only for the maintenance and cure payments, but also for compensatory damages. These are the damages that result from the failure to pay, such as the aggravation of the

seaman's condition. If the shipowner, in failing to pay maintenance and cure, has not only been unreasonable but has been more egregiously at fault, he will be liable for punitive damages and attorney's fees.[10] *This higher degree of fault has been described in such terms as callous and recalcitrant, arbitrary and capricious, or willful, callous and persistent.* Thus, there is an escalating scale of liability: a shipowner who is in fact liable for maintenance and cure, but who has been reasonable in denying liability, may be held liable only for the amount of maintenance and cure. If the shipowner has refused to pay without a reasonable defense, he becomes liable for compensatory damages. When the owner not only lacks a reasonable defense but has exhibited callousness and indifference to the seaman's plight, he becomes liable for punitive damages and attorney's fees as well. *Heaton v. Gulf International Marine,* 536 So.2d 622 (La.App. 1st Cir. 1988); *Morales v. Garijak,* 829 F.2d 1355 (5th Cir. 1987). Punitive damages are recoverable for acts which are willful, wanton, and in callous disregard of a claim of maintenance and cure. The conduct required to grant an award of punitive damages requires an element of bad faith. *Simmons v. Hope Contractors,* 517 So.2d at 336.

Despite the language of the collective bargaining agreement which requires maintenance to be paid weekly, the record shows IBC delayed payments by as much as nine and one-half months. At the time of trial, IBC owed Jordan 227 days in unpaid maintenance.

IBC claims "maintenance payments were delayed

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[10] The trial court did not award attorney's fees, and Jordan has not appealed or answered the appeal to assign this as error.

because medical reports to corroborate Jordan's continued need for medical treatment were not provided." IBC, or its attorneys, had full knowledge of Jordan's injuries, surgery, medical treatment, and continued disability. This was proven by (1) the testimony of Mr. Bell, (2) the November 20, 1989, letter, with the attached medical bills, (3) Jordan's answers to IBC's interrogatories, and (4) the testimony from Dr. Lea who was retained by IBC to examine Jordan. IBC produced no evidence to the contrary. IBC did not call any witness who had knowledge of IBC's handling of this case.

After a thorough review of the record, we cannot say that the jury was clearly wrong in finding IBC arbitrary and capricious and awarding punitive damages.

This assignment of error is without merit.

CONSTITUTIONALTY AND EXCESSIVENESS OF PUNITIVE DAMAGE AWARD

(Assignment of error 5)

IBC asserts its constitutional right to due process was violated by the award of punitive damages. It contends the award is constitutionally defective on three grounds: (1) the standards on which the jury based the award are unconstitutionally vague; (2) the award is excessive and grossly out of proportion to any wrongdoing of IBC; and (3) the preponderance standard of proof on the punitive damages issue does not comport with procedural due process.

The issues of constitutionality of the standards on

which the award was based and the standard of proof were not raised at the trial court level but were raised for the first time on appeal. Because of this, we decline to consider the merits of these issues. *See* Rule 1-3, Uniform Rules—Courts of Appeal; *State v. Madere,* 352 So.2d 666 (La. 1977); *Dent v. Department of Corrections,* 460 So.2d 57 (La. App. 1st Cir. 1984). The issue of constitutional excessiveness of the punitive damages award is properly before this court. We need not address this constitutional issue, however, because we find the award is excessive under Louisiana law.

Among the factors relevant in determining the amount of a punitive damage award are: (1) the nature and extent of the harm to the plaintiff; (2) the wealth or financial situation of the defendant; (3) the character of the conduct involved; and (4) the extent to which such conduct offends a sense of justice and propriety. Courts generally use these factors as guides to determine whether a punitive damage award will best achieve the purposes of punishment and deterrence. J. Bolin, *Enter Exemplary Damages,* 32 La.B.J. 216 (1984). *See also Pacific Mutual Life Ins. Co. v. Haslip,* 111 S.Ct. 1032 (1991).

Louisiana appellate courts have applied the abuse of discretion standard of review in determining whether the amount of a trial court's punitive damage award is excessive. *Varacalle v. Turner,* 556 So.2d 836 (La. App. 1st Cir. 1989); *Chinigo v. Geisman Marine,* 512 So.2d 487 (La. App. 1st Cir.), *writ denied,* 514 So.2d 457 (La. 1987). If an abuse of discretion is found in a damage award, a Louisiana appellate court will lower the award only to the highest (or raise the award only to the lowest) point which is

reasonably within the discretion afforded the trial court; the appellate court may not substitute its judgment for that of the trier of fact. *Reck v. Stevens,* 373 So.2d 498 (La. 1979).

An application of the pertinent factors cited above to the facts of this case shows the following: (1) Jordan was unable to pay his daily living expenses or get needed medical care as a result of IBC's nonpayment of maintenance and cure; (2) there is no evidence in the record pertaining to the financial status of IBC; (3) IBC's conduct in delaying and/or refusing the payments to Jordan was arbitrary and capricious; and (4) IBC's choice to save a relatively small amount of money rather than fulfill its obligation to care for one of its employees injured on its vessel offends a sense of justice.

Under the facts and circumstances of this case, a punitive damage award of $1,000,000.00 is a clear abuse of the jury's much discretion. IBC was arbitrary and capricious in failing to pay $1,816.00 in maintenance and $2,529.20 in cure, a total of $4,345.20. However, IBC's conduct does not support a punitive damage award of this size. After considering all the relevant factors to be used in determining punitive damages, we conclude the highest amount of punitive damages to which Jordan is reasonably entitled under the particular facts and circumstances of this case is $500,000.00.

INTEREST

IBC alleges the trial court erred in awarding legal interest from the date of judicial demand on both the com-

pensatory and punitive damage awards.[11] Prejudgment interest is not recoverable in a Jones Act case tried to a jury. Prejudgment interest is an issue for the jury in a general maritime unseaworthiness claim; it is usually awarded unless there are unusual circumstances which would make an award of such interest inequitable. *Borges v. Our Lady of the Sea Corp.*, 935 F.2d 436, 443 n. 1 (5th Cir. 1991); *McPhillamy v. Brown & Root*, 810 F.2d 529, 532 n. 1 (5th Cir. 1987); Frank Maraist, *Admiralty in a Nutshell* 349 (1983). When a Jones Act and an unseaworthiness claim are tried together to a jury, the prevailing view under federal law is that the plaintiff is not entitled to prejudgment interest unless the jury allocates the award between the two theories of recovery. Where, as here, there is no evidentiary footing for separating the damages caused by unseaworthiness and Jones Act negligence and hence no realistic basis for apportioning damages, there can be no award of prejudgment interest. *Borges*, 935 F.2d at 443; *McPhillamy*, 810 F.2d at 531-532. Thus, the trial court erred in awarding prejudgment interest on the compensatory damages awarded by the jury.

The trial court also erred in awarding prejudgment interest on the punitive damages award. Under both Louisiana and federal law, a plaintiff is entitled to interest on punitive damages only from date of judgment. *Alexander v. Burroughs Corp.*, 359 So.2d 607, 613-614 (La. 1978); *Malbrough v. Wallace*, 594 So.2d 428, 438 (La. App. 1st Cir. 1991), *writ denied*, 596 So.2d 196 (La. 1992); *United States*

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[11] The trial court did not award interest on the maintenance and cure award. Jordan did not appeal; the issue of Jordan's entitlement to interest on that award is not before us.

v. Reul, 959 F.2d 1572 (Fed. Cir. 1992); *Wickham Contracting Co. v. Local Union No. 3*, 955 F.2d 831 (2d Cir. 1992).[12] We thus must amend the judgment to reflect interest only from date of judgment, June 27, 1990, on the awards for lost wages, mental anguish, physical pain and suffering, mental pain and suffering, and punitive damages.

DECREE

For the foregoing reasons, the judgment of the trial court is amended to (1) reduce the award for lost wages to $142,942.81, (2) reduce the award for maintenance to $1,816.00, and (3) reduce the punitive damages award to $500,000.00. The judgment of the trial court is amended to award legal interest only from date of judgment, June 27, 1990, on the awards for lost wages, mental anguish, physical pain and suffering, mental pain and suffering, and punitive damages. In all other respects, the judgment of the trial court is affirmed. IBC is cast for all costs of this appeal.

AFFIRMED IN PART; AMENDED AND AFFIRMED IN PART.

GONZALEZ, J., I respectfully dissent and agree with the reasons of SHORTESS, J., and assign additional reasons.

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[12] We note the plaintiff failed to pray for interest on the punitive damages award. The granting of interest on this maritime issue is a matter of federal substantive law. Federal law is clear that "a meritorious claim will not be rejected for want of a prayer for appropriate relief." *Holt Civic Club v. City of Tuscaloosa*, 99 S.Ct. 383, 387 (1978); F.R.C.P. 54(c). The result would be the same were Louisiana law applied. *See Mini Togs Products v. Wallace*, 513 So.2d 867 (La. App. 2d Cir.), *writs denied*, 515 So.2d 447, 515 So.2d 451 (La. 1987).

SHORTESS, J., dissents with reasons.

SHORTESS, Judge, dissenting.

Jordan's lead attorney took the stand and testified on the plaintiff's behalf. The jurors chatted with the plaintiff on the courthouse steps during the trial. I disagree with the result reached by the majority because, in my opinion, the cumulative effect of these two facts deprived IBC of a fair trial.

Jordan's Attorney as a Witness

I disagree with the majority's analysis of this issue and its conclusion "Bell was properly permitted to testify." In *State v. Miller,* 391 So.2d 1159, 1162 (La. 1980), the court stated that while an attorney may be a **competent** witness, the issue is not the admissibility of his testimony but the propriety of allowing him to assume the dual role of advocate and witness. The admission of Bell's testimony, standing alone, may have been harmless error. Combined with the juror misconduct in this case, however, it resulted in prejudice to IBC.

Juror Misconduct

IBC moved for a misstrial based on a conversation during the trial between three or four of the jurors, the plaintiff, and the plaintff's son. The trial court examined the jurors in private and denied the motion, finding mistrial was "a bit too harsh a remedy for the situation" because "there is no harm done to either side...." The majority affirms, finding IBC failed to show it was " 'impossible to reach a proper judgement' in this case."

The majority cites *Usner v. Strobach*, 591 So.2d 713 (La. App. 1st Cir. 1991), *writ denied*, 592 So.2d 1289 (La. 1992), in which the trial judge denied a motion for mistrial based on his factual observation that tales jurors who were also courthouse employees were not prejudiced against the plaintiff. I dissented in that case because I believe the seating of courthouse employees who knew the defendant as tales jurors was prejudicial misconduct which deprived the plaintiff of a fair trial, even though it was impossible for the plaintiff to **prove** prejudice. *Usner*, 591 So.2d at 731 (Shortess, J., dissenting). Similarly, in this case, it was impossible for the defendant to **prove** plaintiff's conversation with the jurors during the trial prejudiced them in his favor. It is obvious, however, that when a party converses with several of the jurors during the course of the trial, he establishes a rapport with those jurors which could subliminally prejudice those jurors in his favor.

The combination of the juror misconduct and the testimony of plaintiff's lead counsel effectively denied the defendant a fair trial. I would reverse and remand for a new trial. However, since the record is complete and

acknowledging the scope of appellate review in these situations, a de novo review of the record would be an appropriate course of action.

I respectfully dissent.

GONZALES, Judge, concurring in part and dissenting in part.

The majority concludes that a $1,000,000 punitive damage award for failure to pay $4,345.20 is a clear abuse of discretion and lowers the award to $500,000. I submit that a $500,000 punitive damage award under the facts of this case is an abuse of discretion.

An examination of other awards demonstrates how disproportionate the award herein is. The majority opinion fails to cite any punitive damage award for failure to pay maintenance and cure that approaches the $500,000 award in this case. The largest punitive damage award that has been found was $296,240 for failure to pay $8,760 in maintenance and cure in *Gaspard v. Taylor Diving & Salvage Co., Inc.*, 649 F.2d 372 (1981). The next largest punitive damage award found for a failure to pay maintenance and cure was $175,000 in *Reed v. Seacoast Products, Inc.*, 458 So.2d 971 (La. App. 3rd Cir. 1984). In that case the defendant did not pay cure of $17,743 to plaintiff who had undergone surgery for the removal of two discs and needed additional surgery. Defendant also terminated maintenance payments after a year for no reason. In *Porche v. Maritime Overseas Corporation*, 550 So.2d 278 (La. App. 4th Cir. 1989), $100,000 in punitive damages were awarded. In that case, the plaintiff was injured on October 28, 1985, and defendant did not pay cure until January 12, 1987, despite having knowledge that plaintiff had undergone two surgeries on his knee. Also, the defendant only paid a few months of maintenance during that time period. These punitive damage awards are at the high end of the scale in maintenance during that time period. These punitive damage awards are at the high end of the

scale in maintenance and cure cases. *See for example, Simmons v. Hope Contractors, Inc.*, 517 So.2d 333 (La. App. 1st Cir. 1987), *writ denied*, 518 So.2d 510 (La. 1988), where the court awarded $25,000 in punitive damges for a failure to pay $6,260 in maintenance and cure.

After considering all the relevant factors that go into awarding punitive damages, I conclude that the highest amount of punitive damages that Jordan is reasonably entitled to under the particular facts and circumstances of this case is $150,000.

APPENDIX B

COURT OF APPEAL, FIRST CIRCUIT
STATE OF LOUISIANA

RE: Docket Number 90/CA/2146
JOHN E. JORDAN AND EMO JEAN JORDAN
—VERSUS—
INTERCONTINENTAL BULKTANK CORP.

Parish of West Baton Rouge

On application for Rehearing.
Rehearing **DENIED**

Melvin A. Shortess
/s/ Burrell J. Carter
Burrell J. Carter
/s/ Hillary J.Crain
Hillary J. Crain

Douglas M. Gonzales
/s/ Remy Chiasson
Remy Chaisson
/s/ Shortess, J. would grant a rehearing for reason stated in his dissent.
/s/ Gonzales, J. would grant a rehearing.

FILED APR 28 1993

/s/ Stanley P. Lemoine
STANLEY P. LEMOINE, Clerk

APPENDIX C

THE SUPREME COURT OF THE STATE OF LOUISIANA

JOHN E. JORDAN

VS. No. 93-C - 1433

INTERCONTINENTAL BULKTANK CORPORATION

- - - - - -

IN RE: Jordan, John E.; - Plaintiff(s); Applying for Writ of Certiorari and/or Review; to the Court of Appeal, First Circuit, Number CA90 2146; Parish of West Baton Rouge 18th Judicial District Court Div. "D" Number 21,033

- - - - -

September 17, 1993
Denied.

WFM

JLD

HTL

PH

CDK

CALOGERO, C.J., & ORTIQUE, J., would grant the writ.

WATSON, J., not on panel.

Supreme Court of Louisiana
September 17, 1993

/s/ Illegible

Clerk of Court
For the Court

APPENDIX D

IN THE SUPREME COURT OF THE STATE OF LOUISIANA

JOHN E. JORDAN

VS. No. 93-C - 1447

INTERCONTINENTAL BULTANK CORPORATION

- - - - - -

IN RE: Intercontinental Bulktank Corp; - Defendant(s); Applying for Writ of Certiorari and/or Review; to the Court of Appeal, First Circuit, Number CA90 2146; Parish of West Baton Rouge 18th Judicial District Court Div. "D" Number 21,033

- - - - -

September 17, 1993
Denied.

WFM

JLD

HTL

PH

CDK

CALOGERO, C.J., & ORTIQUE, J., would grant the writ.

WATSON, J., not on panel.

Supreme Court of Louisiana
September 17, 1993

/s/ Illegible

Clerk of Court
For the Court

APPENDIX E

SUPREME COURT OF LOUISIANA

93-C-1447

JOHN E. JORDAN

versus

INTERCONTINENTAL BULKTANK CORPORATION

ORDER

Considering the motion of defendant, Intercontinental Bulktank Corporation, which intends to petition for a writ of certiorari to the United States Supreme Court,

***IT IS ORDERED** that the execution and enforcement of the judgment of the Louisiana Court of Appeal, First Circuit, in Jordan v. Intercontinental Bulktank Corporation, 621 So. 2d 1141 (La. App. 1st Cir. 1993) is stayed for a period of ninety days, from September 20, 1993.*

New Orleans, Louisiana, this 24th day of September, 1993.

/s/ Pascal F. Calogero

Chief Justice Pascal F. Calogero
*For the Majority**

Justices Dennis and Kimball dissent from the order.

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* *Justice Watson was not on the panel.*

APPENDIX F

THE SUPREME COURT OF THE STATE OF LOUISIANA

JOHN E. JORDAN

VS. No. 93-C - 1447

INTERCONTINENTAL BULKTANK CORPORATION

. . . . . .

In Re: John E. Jordan, applying for Reconsideration of this Court's Order dated September 24, 1993; to the Court of Appeal, First Circuit, No. CA90 2146, Parish of West Baton Rouge, 18th Judicial District Court, Div. "D", No. 21,033.

. . . . .

October 8, 1993

Motion denied.

WFM

PFC

HTL

PH

DENNIS, KIMBALL & ORTIQUE, JJ., would grant the reconsideration.

WATSON, J., not on panel.

Supreme Court of Louisiana
October 8, 1993

/s/ Illegible

Deputy Clerk of Court
For the Court

APPENDIX G

18TH JUDICIAL DISTRICT COURT

PARISH OF WEST BATON ROUGE

STATE OF LOUISIANA

JOHN E. JORDAN

VERSUS

INTERCONTINENTAL BULKTANK CORPORATION

NO: 21,033 DIV: "D"

****

JUDGMENT

This matter came on for trial on the merits on June 11, 1990, June 15 & 16 1990, pursuant to regular assignment, before a Civil Jury.

PRESENT IN COURT:

TERRY BELL, ESQ., PATRICK W. PENDLEY, ESQ. and JOHN M. DEAKLE, ESQ., counsel for John E. Jordan; and,

PATRICK O'KEEFE, ESQ. and IRA J. ROSENZWEIG, ESQ., counsel for Intercontinental Bulktank Corporation.

The jury, having considered the law and evidence, made its findings and rendered its verdict as follows:

"JORDAN VS. INTERCONTINENTAL"

1. Was the Overseas Alaska, its appurtenances and apparel unseaworthy on June 2, 1988?

   Yes X No

2. Do you find that Intercontinental Bulktank Corporation or its employees were negligent, and was that negligence a cause of the injury to John Jordan?

   Yes X No

   If you have answered the first two (2) questions in the negative, it is not necessary for you to answer question 3, 4 and 5. Please go to question 6. If either question 1 or 2 has been answered in the affirmative, then you should answer question 3, 4, 5 and 6.

3. Was John Jordan negligent, and was that negligence a legal cause of injury to John Jordan?

   Yes No X

   If you have answered question 3 in the negative, then go to question 5.
   If you have answered question 3 in the affirmative, then you must answer question 4, before you answer question 5.

4. If you answered question 3 in the affirmative, in what percentage did John Jordan contribute to his injury?

_____%

5. What amount of damages do you find will adequately compensate John Jordan for his damages. You should not make any deduction for any negligence you may have assessed against John Jordan, the court will make that adjustment after the trial. The amount of money you award to John Jordan should be the full measure of his damages.

TOTAL WAGE LOSS	$250,000.00
MENTAL ANGUISH	$125,000.00
PAST AND FUTURE PAIN AND SUFFERING	$150,000.00
PAST AND FUTURE MENTAL PAIN AND SUFFERING	$125,000.00
TOTAL:	$650,000.00

6. Do you find that Intercontinental Bulktank Corporation was arbitrary and capricious in failing to timely pay maintenance and cure to John Jordan?

Yes __ No __

If so, what is the amount of punitive damages $1,000.000.00

s/ Darren McKay Chauvin
FOREPERSON

JUNE 16, 1990
PORT ALLEN, LOUISIANA

The jury having considered the law, the evidence, the stipulations and arguments of counsel, the Court herewith enters judgment pursuant to the jury findings as follows:

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment rendered herein in favor of John E. Jordan and against the defendant, Intercontinental Bulktank Corporation, in the full sum and amount of ONE MILLION SIX HUNDRED FIFTY THOUSAND AND NO/100 ($1,650,000.00) DOLLARS, together with legal interest thereon from July 7, 1988 until paid.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all cost of court in this matter be assessed to the defendant, Intercontinental Bulktank Corporation.

The court having directed a verdict on behalf of the plaintiff on the issue of maintenance and cure enters judgment as follows:

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of the plaintiff, John E. Jordan and against the defendant, Intercontinental Bulktank Corporation in the sum of TWO THOUSAND FIVE HUNDRED TWENTY-NINE AND 20/100 ($2,529.20) DOLLARS for unpaid cure (medical) and that there be further judgment herein in favor of the plaintiff, John E. Jordan and against the defendant, Intercontinental Bulktank Corporation in the amount of TWELVE THOUSAND SIX HUNDRED SIXTY-FIVE AND NO/100 ($12,665.00) DOLLARS representing unpaid maintenance due plaintiff from the date of the accident, June 2, 1988 through June 16, 1990 at the rate of SEVENTEEN AND NO/100 ($17.00) DOLLARS per day, subject however to a credit of FOUR THOUSAND ONE HUNDRED FORTY-FOUR AND NO/100 ($4,144.00) DOLLARS having heretofore been paid to John E. Jordan by the Intercontinental Bulktank Corporation.

JUDGMENT READ, RENDERED AND SIGNED on this 27th day of June, 1990 in Chambers at Port Allen, Louisiana.

/s/ Jack Marionneaux

DISTRICT JUDGE

APPENDIX H

[264]THE COURT: Ladies and Gentlemen of the Jury, as we said before sometimes you'll be run out. It gives you a little break anyway. There was — the objection was made to the calling of a — an attorney as a witness in this case. The objection was sustained while you were out. Do not hold this against either party in this case. Okay, Mr. Deakle.

MR. DEAKLE: In view of the Court's ruling, Your Honor, we'd — we'd call Mr. Bell to the stand, the attorney for the plaintiff.

[265]THE COURT: All right.

(WITNESS BEING SWORN IN BY DEPUTY CLERK OF COURT).

MR. O'KEEFE: Your Honor, we would object to the calling of Mr. Bell as a witness in this case, as well. He's not listed on the witness lists. We have other grounds for the objection. We're hesitant to make them to the Court in Open Court.

THE COURT: The Jury will be retired.

JURY RETIRED

DEPUTY CLERK: One of the Jurors said the attorneys have to speak up a little.

THE COURT: Oh, okay.

(OFF-RECORD DISCUSSION).

THE COURT: Okay. Make your objection.

MR. O'KEEFE: Yes, Your Honor. I would suggest to the Court, Your Honor, that Mr. Bell is not on the witness list, and the reliance on the witness list is something that has been trudged through more than once this morning. I would suggest to the Court that in addition to that, there is the question of whether Mr. Bell as counsel for the plaintiff can now testify and - and reduce his arguments to[266] what is tantamount to evidence. The Court is going to give the Jury an instruction at the end of this trial saying that what the attorneys tell you is not evidence —

THE COURT: The instruction —

MR. O'KEEFE: - with the exception of Mr. bell who is giving you evidence.

THE COURT: — the instruction also says that your — your evidence comes only from the witness stand.

MR. O'KEEFE: But, Your Honor, where you let an attorney be the witness, what you've done is cloak him with some greater credibility than his opponent enjoys.

THE COURT: That's why I asked a minute ago if you would stipulate as to what the man wanted to put into evidence and I think it's those letters about whether or not he got them in there —

MR. O'KEEFE: Your Honor —

THE COURT: — and I'm not — I'm going to tell you right now, I'm not going to prevent him from putting those letters in evidence. If you don't want the man to testify, stipulate that the letters were sent or got to you or received or whatever. If you don't, I'm going to let him testify.

[267]MR. O'KEEFE: Your Honor, I —

THE COURT: You have — you have a witness over here who's a corporate representative, who knows nothing about it and I think he has a right to put these letters in evidence. I'm listening. I know what this case is about. I've been here for I don't know, a year and a half, two years on this case since it started and he's got a right to get those letters into evidence and I think the easiest way without having the problem is to stipulate. If you don't want to do that, I'm going to let him testify; very simple.

MR. O'KEEFE: Your Honor, this is — this is the problem I've got, Your Honor —

THE COURT: — that's the ruling of the Court.

MR. O'KEEFE: I'm — I am not going to stipulate to the letters and I would ask for a recess to take supervisory writs in view of the Court's ruling.

THE COURT: Denied. Mr. Bell to the stand. Call the Jury back in. You can take all the writs you want; I will sign an order, but I will not stay the proceeding.

JURY IN

THE COURT: Plaintiff waive[268] polling?

MR. DEAKLE: Yes, sir; Your Honor.

THE COURT: Defense? Defense waive polling of the Jury?

MR. O'KEEFE: Yes, Your Honor. We'll waive it.

THE COURT: Okay.

[269]TERRY BELL

TERRY BELL, after having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. DEAKLE:

Q State your name, please.

A Terry Bell.

Q What occupation or profession, if any, do you engage in?

A I practice law.

Q Are you licensed to practice law in the State of Louisiana?

A Yes, I am.

Q In - in pursuit of that practice, have you, in the past, represented Mr. John E. Jordan, the plaintiff here today?

A I have.

Q Mr. Bell, you are, are you not, the - the lead counsel in regard to this matter?

A Have been — yes, I have.

Q In the regular prosecution of your office business in this case in particular, have you caused to be, at your direction, certain correspondence prepared and sent to the firm of Phelps/Dunbar who represents the defendant in this matter?

A Yes, we have.

Q I'd like to hand you a letter —

MR. O'KEEFE: Previously marked, I take it,"P-23"?

Q — "P-23"

MR. O'KEEFE: I think I'm familiar with the exhibit, Your Honor.

[270]Q Okay. With that announcement, I will hand that to you, Mr. Bell and ask you if you are familiar with that letter?

A Yes, sir, I am.

Q Did you cause that letter to be prepared?

A This letter was dictated by me and prepared at my direction and sent to the previous counsel for defendant, Mr. Clayton Ramsey, who was with the law firm that defends Intercontinental Bulktank Corporation at the time that the letter was sent.

Q All right, sir. In regard to your representation, did you cause certain written answers to be sent to the Phelps — to the Phelps/Dunbar firm in New Orleans, in regard to certain written questions they had asked Mr. John Jordan; yes, sir?

A Yes - yes.

MR. DEAKLE: We would ask that "Plaintiff's Twenty-three (23)" be admitted into evidence.

MR. O'KEEFE: To which we raise an objection.

THE COURT: Ground?

MR. O'KEEFE: Your Honor, these are the arguments of counsel; they've been reduced to writing; and they should not be made into evidence any more than my arguments to the Court or to the Jury are evidence.

THE COURT: The letter?

MR. O'KEEFE: Yes, sir, the[271] letter contains phraseology. The letter contains persuasive passages. I believe that to make that into evidence dignifies the arguments of counsel to the level of evidence.

MR. DEAKLE: Perhaps I should - should go just a little further with the content of the letter.

BY MR. DEAKLE:

Q What was the purpose of writing the letter and what's the date on this letter?

A November 20th, 1989.

Q What was the purpose of you sending the letter to the attorney for the defendant?

A I was attempting to obtain from Intercontinental Bulktank Corporation payment of the medical bills that were outstanding in this ease.

Q Read the letter, please.

A 'Dear Clayton, As I promised last week, you will find enclosed a revised medical tabulation" —

MR. O'KEEFE: Your Honor, I would object to a reading of an exhibit that hasn't yet been admitted.

MR. DEAKLE: The basis of his objec-

that the letter contained phraseology. We — would the Court —

MR. O'KEEFE: I should like to have the Court look at the letter in that case.

THE COURT: Let me see it.

(THE COURT BEING HANDED DOCUMENT).[272]

MR. O'KEEFE: Mr. Deakle knows very well that by getting Mr. Bell to read the letter, the cat wil be out of the bag by the time Your Honor rules.

THE COURT: Well, let's quit arguing in front of the Jury —

MR. DEAKLE: — I didn't let the cat out of the bag —

THE COURT: — I don't need —

MR. DEAKLE: — we have nothing to hide.

THE COURT: Okay. I'm going to let you two gentlemen decide for me.

(OFF-RECORD DISCUSSION AT BENCH).

BY MR. DEAKLE:

Q Without reading the entire letter, Mr. Bell, again what was the purpose of that letter?

A Purpose of the letter was to attempt to obtain payment of certain medical bills that were still outstanding as a result of Mr. Jordan's care and to obtain payment of what we considered to be past due maintenance. There was a number of attachments to the letter. Attached to the letter was a medical tabulation showing amounts that had been incurred paid by the welfare plan, paid by the attorneys and what was outstanding and —

Q I hand you a set of documents approximately a quarter to a half inch thick. Are those the attachments of which you speak?

[273]A These are the attachments that were attached to the letter. It was sent as a package to Mr. Ramsey.

Q And it is — is it your testimony here today that - that these are, in fact, the attachments?

A That's correct.

MR. DEAKLE: And, Your Honor, we would submit the letter and the attachments as an exhibit with the proviso that the last sentence of page one of the letter be - be obliterated.

MR. O'KEEFE: Objection.

THE COURT: Do you object to the whole document or just that last statement?

MR. O'KEEFE: I object to the attempt to cure a document as to which we have difficulty and which we have explained to the Court by simply excerpting out some portions of it.

MR. DEAKLE: Let the record reflect that plaintiff has absolutely no difficulty. We're trying to accomodate the defense.

Mr. O'KEEFE: Well, we tried to accomodate the plaintiff's counsel as well, Your Honor, and our suggestion was that the depositions of the individuals who have the direct knowledge about paid and unpaid bills be deposed. And unfortunately that wasn't done. Now counsel's attempting to cure that shortcoming by getting his cohort[274] to testify.

MR. DEAKLE: Now, Your Honor, I would ask the Court to not allow this gentleman to testify by way of objection, because he — we have tried to get him to take the stand — I would come back and say if he would have brought his company representative from New York City, who - who will pay enough attention to this case to come down here and testify, we wouldn't be here today, but I'll refrain from that kind of testimony. However, if you'd like for me to take the stand and tell the truth —

THE COURT: Well —

MR. DEAKLE: — to these people, I'll be glad to do that.

THE COURT: — that's enough.

MR. O'KEEFE: And I'll do the —

THE COURT: That's enough.

MR. O'KEEFE: — same, We'll sit up there together.

THE COURT: That's enough. You've had both shots now. That's - that's - enough firing going across the board. The document will be entered as is.

MR. DEAKLE: Thank you. "Composite 23".

MR. O'KEEFE: Your Honor, for the record, we object to the "Composite[275] 23".

THE COURT: Objection is noted. Overruled.

BY MR. DEAKLE:

Q Mr. Bell, have you — did you have other occasions to write to the defendants and attempt to try to get the medical and maintenance paid in regard to Mr. Jordan?

A Numerous occasions.

Q Let me hand you a letter dated March 15th, 1990, that is sent certified mail to Mr. Clayton Ramsey, Esquire, one of the attorneys for the defendant.

MR. O'KEEFE: Your Honor, this isn't listed on any exhibit list. It's not been shown to us until this very moment. It's not something that we were aware would be used as evidence in today's case.

MR. DEAKLE: Your Honor, if it please the Court, we've got a signed copy where they signed for it at the post office. So, it certainly was known to them.

MR. O'KEEFE: Well, Your Honor, that's not the point. I'm trying to ask Mr. Deakle to live with the rules, and the rules provide that we be given some notice about what he intends to use as evidence.

THE COURT: I'm going to sustain[276] that objection. The other one was listed?

MR. O'KEEFE: Yes, Sir.

THE COURT: Sustained.

MR. O'KEEFE: At least we were shown it this morning.

THE COURT: Sustain the objection. Let me ask you this. Is there a pre-trial order in this matter? I haven't even looked.

MR. O'KEEFE: No.

MR. ROSENZWEIG: No, Your Honor.

THE COURT: I'm going to reverse my ruling in that case. There is no restriction in a pre-trial order — I mean not having a pre-trial order, there is no lists.

BY MR. DEAKLE:

Q I now hand you a copy of a March 15, 1990 certified letter. Can you tell me whetеher or not you wrote that letter?

A Yes, I did.

Q And to whom is it addressed?

A It's addressed to Mr. Clayton Ramsey.

Q What was the purpose of that letter?

A To obtain payment of - of maintenance benefits for Mr. Jordan.

MR. DEAKLE: Okay. We ask that that be "Plaintiff 24".

MR. O'KEEFE: We renew our objection.

[277]THE COURT: Let me — let me ask you this. In the book of documents —

MR. DEAKLE: That was not included.

THE COURT:— you already have a "P-24" in there.

MR. DEAKLE: Okay. We'll make it —

THE COURT: "26".

MR. DEAKLE: — "P-26".

THE COURT: And the objection's overruled.

Q I now hand you a response to Defendant's Request for Production of Documents, which was caused to be mailed to the defendants on or about the 9th day of November of 1989. First of all, I'd like for you to quickly explain to us what a request for production of documents —

THE COURT: Did you show this to counsel?

MR. DEAKLE: This - this - this is part of the court file.

THE COURT: No, but I mean — right now, did you show it to him?

MR. O'KEEFE: I assumed I wasn't even going to get the chance to look at it.

BY MR. DEAKLE:

Q Could you tell us what a request for and a response to production of documents is in regard to how a case is developed —

MR. O'KEEFE: Objection, Your Honor, he's asking the witness to tell the[278] Jury what the law is. That's your function.

THE COURT: Sustained.

BY MR. DEAKLE:

Q All right. Were you — was Mr. Jordan asked by the other side to provide certain documents and pieces of paper through the development of the case into the Court file?

A Yes, he was.

Q And did you, as his lawyer, prepare such a response and send that?

A I did.

Q Okay. Can you tell me what the request was or - or what the responses — what the areas — the documents that - that - that - that were requested?

A Well, from the responses that I have in my hand, the request number one would have been, as far as I could tell, any request to produce any documents

showing earnings by Mr. Jordan, apparently from 1984 through the date of the request, because our response indicates we didn't have any for '84, '85 and '86, but we forwarded income tax returns for '87 and '88.

Q And that was sent in November of 1989?

A We mailed it to opposing counsel on the 9th of November, 1989.

Q All right, sir. What was the - the next area of documents that you sent?

A From the response, it apparently requested all medical bills and reports and records that plaintiff had in his possession.

Q And was that done on - on the 9th day of November, 1989?

[279]A That's correct. This document, again, similar to the other letter, had a number of documents attached when it was forwarded to opposing counsel.

Q All right.

A And this is the package that was forwarded to Mr. Ramsey with the response and it includes the tax returns and the rest of it is medical bills and records for Mr. Jordan.

Q. What other areas of inquiry did you make?

A I can't tell from looking at the response. Number three says, "none available". Four says, "None available". Apparently we didn't have any documents that would respond and the last date were things we — they asked the plaintiff to require or asked the plaintiff to attach or sign certain authorizations and there weren't any attached, so —

Q Did you express a willingness on behalf of our — of your client, John Jordan, to sign any medical releases whatsoever so that they could get any documents they wanted?

A To my knowledge, Mr. Jordan signed all authorizations that were presented to us in request.

MR. DEAKLE: We would ask that the response to the document request, which was mailed as this witness had testified on the 9th day of November, 1989, along with the document produced, be "Plaintiff's 27".

MR. O'KEEFE: To which we would object, your Honor.

[280]THE COURT: On what grounds?

BY MR. DEAKLE:

Q I now hand you a document —

THE COURT: Wait, excuse me, on what grounds?

MR. PENDLEY: He objected — he objected.

MR. DEAKLE: Oh, he did?

MR. PENDLEY: He objected.

MR. O'KEEFE: Object. We object.

MR. DEAKLE: Oh, okay.

MR. O'KEEFE: Your Honor, we object inasmuch as much as the attachments that have been provided here are — are attachments which we have not been told are part of the exhibits in the case and consequently, we are attempting to augument — supplement an exhibit book that was tendered to us this morning, but more of the point, these - these are documents which have not been authenticated and the — and the individuals who have prepared these econom — these accounting tabulations rather, could have been deposed and could have explained to us what the situation was in those documents. At the moment, we have no information about what they mean.

THE COURT: Did you not get a copy of this information previously?

[281]MR. DEAKLE: Your Honor, all of those documents are in this book and they have been accepted this morning —

MR. O'KEEFE: If —

MR. DEAKLE: — that includes the medical records, too.

MR. O'KEEFE: — if they've been put into the book, Your Honor, and we've already accepted them, then I will withdraw my objection as long as they are not put in a second time.

MR. DEAKLE: The point is we want the record to be clear as to what documents these gentlemen got at what time in regard to this gentleman's medical condition, his financial condition. That's where they're relevant.

MR. O'KEEFE: Now, we're going to duplicate evidence, Your Honor.

THE COURT: I don't think that's — they can look past that. Would you also like to have the request put in with 'em at the same time?

MR. DEAKLE: At your own request, Mr. O'Keefe?

MR. O'KEEFE: It's your case, Mr. Deakle, I - I —

MR. DEAKLE: We would ask that Mr. O'Keefe's request be - be - be quiped in so we'll know exactly what he asked us[282] to produce

and how we responded to it. Make that be part of "27" if we —

THE COURT: I think it's fair. Do you have the request, also?

MR. DEAKLE: Yes, sir; they're right there.

THE COURT: The objection's overruled. Both documents — all documents will be put in that "27". Okay.

BY MR. DEAKLE:

Q I now hand you — I now ask you whether or not during the course of the litigation you received certain written questions from the defendants asking you to respond under oath or asking Mr. Jordan to respond under oath?

A Yes, we did.

Q Okay. I now hand you a document entitled "Answer to Interrogatories".

MR. DEAKLE: Is that what you're asking for?

MR. O'KEEFE: Your Honor, if I might just inquire of counsel, is it his intention to offer the interrogatories and the answers?

MR. DEAKLE: Yes sir.

MR. O'KEEFE: Well, I think I see where this is going. I have no objection.

MR. DEAKLE: You have no objection to these documents?

MR. O'KEEFE: No, sir.

[283] MR. DEAKLE: We'd ask that the first set of interrogatories from the defendants to the plaintiffs and the plaintiffs' responses be attached as a "Composite Exhibit 28".

THE COURT: So ordered.

BY MR. DEAKLE:

Q Well, I hand you now this set of questions that were sent from the defendants and Mr. Jordan's answers. I want to direct your attention to question number twelve (12) as put to the plaintiff by the defendant; would you read the question, please?

A "State whether you have had any serious illness, sickness, disease or surgical operations either prior or subsequent to the incident referred to in your petition and if so for each illness state a detailed description of your symptoms, the names and addresses of any hospitals rendering treatment, the names and addresses of all physicians, surgeons, osteopaths, chiropractors or medical practitioners

rendering treatment and the approximate date of your recovery." All right, and what was the answer?

MR. O'KEEFE: Your Honor, don't these documents speak for themselves?

THE COURT: They do.

MR. O'KEEFE: Then our objection is that the documents are in evidence and there's no necessity to read them.

THE COURT: Sustained.

MR. DEAKLE: We'll tender the[284] witness, Mr. O'Keefe.

CROSS-EXAMINATION

BY MR. O'KEEFE:

Q Mr. Bell, in - in your dealings with the defendant in this case on behalf of Mr. Jordan, were you not told that maintenance payments are made on the presentation of medical evidence demonstrating disability for a period of time?

MR. DEAKLE: To which —

A I —

MR. DEAKLE: — to which we object. That's

outside the limited scope of which this gentlemen is here and that is to put the documents into —

MR. O'KEEFE: Your Honor —

MR. DEAKLE: — into the record.

MR. O'KEEFE: — they can't call him and then shut the door on me.

THE COURT: Exactly. Let me ask you this. Are you asking him a legal question?

MR. O'KEEFE: Am I asking a legal question?

THE COURT: Legal opinion?

MR. O'KEEFE: No, sir, I'm asking him what - what were the occurrences in this case.?

MR. DEAKLE: No, sir. He is asking him what this law firm's opinion was as to when maintenance and cure is payable. [285]That will come from Your Honor's lips at the end of this trial, as I appreciate it.

MR. O'KEEFE: Mr. Deakle misunderstands my question and Mr. Bell —

THE COURT: Reask — reask you question.

MR. O'KEEFE: Thank you, sir.

BY MR. O'KEEFE:

Q Mr. Bell, was it not your understanding of the method of operation in this case that maintenance payments would be made by the defendant upon the presentation of medical evidence that demonstrated a continuing disability?

MR. DEAKLE: To which we object. That goes right to the heart of maintenance and — the law as to maintenance and cure.

MR. O'KEEFE: Your Honor, I'm trying to just —

MR. DEAKLE: Wait. Let him —

THE COURT: All right. Go ahead, argue.

MR. O'KEEFE: Are you finished, sir, with your objection?

MR. DEAKLE: Yes.

MR. O'KEEFE: What I'm trying to demonstrate, Your Honor, is that —

THE COURT: I don't want to know what you want to demonstrate. I want to have your argument on this objection.

[286]MR. O'KEEFE: All right. The objection is that it goes to the heart of maintenance and cure; is that the objection? Because that's - that's what Mr. Bell's here —

MR. DEAKLE: It goes —

MR. O'KEEFE: — to do.

MR. DEAKLE: — it - it - it - it -it goes to your firm's legal obligation that they don't want placed upon this gentlemen to get his maintenance and cure and that's not fact, sir, that's the law.

MR. O'KEEFE: Your Honor, my firm has no legal obligation to Mr. Jordan and I object to the characterization in that fashion. The defendant has a legal obligation. If it exists, the Jury will find it and Your Honor will do so as well.

THE COURT: I'll tell 'em — I'll tell the jury what the legal obligation is and they'll determine whether or not the obligation was carried forth; not whether Mr. Bell finds that it is the obligation or whether the - the procedure or the law was followed in the matter.

MR. O'KEEFE: I'm trying to learn from Mr. Bell what the practice was in this case and what he was told the defendant would do. How was it to be[287] taken care of.

MR. DEAKLE: The practice of the defendant's law firm be it benevolent or callous —

MR. O'KEEFE: Not law firm, Your Honor, defendants.

MR. DEAKLE: — let me finish. Whether it's benevolent or callous towards this gentleman is not what is issue here today. What is - is at issue is what facts they had before them and whether the comported with the law or not.

THE COURT: That's correct.

MR. O'KEEFE: Your Honor, has allowed a letter written by this attorney to go into the record making demand and you won't let me find out what the background is.

THE COURT: You're asking me if he's following the law.

MR. O'KEEFE: No, sir, I'm not asking —

THE COURT: You're asking him that. You're asking him.

MR. O'KEEFE: — I am not asking him that. I want to know what was the understanding reached between him and the defendant,

corporation. How are we going to take care of this, Mr. Bell?

THE COURT: Well, first of all[288], ask him if there was an agreement.

BY MR. O'KEEFE:

Q Was there not, Mr. Bell, an understanding as to when maintenance would be paid?

A Well, Mr. O'Keefe, being the attorney I want to stay within — I could go on. No, there was never any understanding. I could not reach an understanding with Mr. Ramsey. I bombarded him with letters and documents to obtain payment of the medical. It's never been paid, and we only got maintenance out of him after numerous extensive request and I don't know what the policy of Maritime Overseas or Intercontinental Bulktank Corporation was, because they never corresponded with me. I only know what was told — was sent to me in letter from either Mr. Ramsey or Mr. Rosenzweig.

Q Did Mr. Ramsey not tell you, sir, that if you presented the medical, he would pass it on to MOC and that would be the basis for paying maintenance?

A. No, he said if I presented the medical he would pass it on to MOC. They did send me a number of letters saying that they required this or that or this or that to get maintenance and we'd send 'em something. It would not be adequate. I'd have to send them something else. Keep sending them something until finally they decided that that was what they wanted.

Q So, MOC did send you letters saying if you will send us certain documents and help us document what it is we're giving you the money for, we'll send you the money; didn't they?

A No, MOC never sent me a letter.[289]

Q Well, did you not just tell me that you got correspondence from MOC saying we need this to be able to pay it?

A No, I said I got the correspondence from either Mr. Ramsey or Mr. Rosenzweig. My file has no correspondence from MOC —

Q All right.

A — none.

Q So, you were told, however, by either Mr. Ramsey or Mr. Rosenzweig that if certain documentation was provided, that the maintenance could be — could be documented; couldn't it? That the payments then could be supported?

A We argued about it a lot and I was told that, yes, and I never agreed with their position on what the obligation of the company was to investigate the medical.

Q Now, is it not also the case, Mr. Bell, that the Seafarer's Welfare Plan is the method currently in use to pay medical expenses and then they turn

around and they bill the employer for what they paid at the end of the year; isn't that true?

A I don't know how the welfare plan works.

Q Were you not told that by Mr. Ramsey?

A No, I was not.

Q So, it — were you not told by your client then or somebody that the welfare plan makes the payments up front because the public service — the public health hospitals have been closed and it's —

A They didn't tell me that —

Q — billed back to the employer; isn't it?

A — no, I don't know whether it was billed back or not[290]. I know that a seaman that has a hundred (100) — at least a hundred twenty (120) days sea time prior to an injury has a right to have at least a portion — I don't even know what portion, but some part of his medical bills paid by the health and welfare plan. That's by contract, but my argument with Mr. Ramsey was always that that didn't obviate the obligation of the employer to investigate and pay.

Q But, Mr. Bell, you were aware and are aware, are you not, that the way the welfare plan works is that if a fellow has an occupational or non-accidnet problem then the Union will pay for it out of the plan; if he has an accident problem they pay for it and get

reimbursed by the employer; didn't you know that?

MR. DEAKLE: Excuse me. May I interpose an objection. I - I believe that Mr. Bell and Mr. O'Keefe are worthy adversaries and they can banter about all day long. We're talking about obligations and responsibilities; that is something that the law places on an employer or not a permanent employer. Your Honor, that will be something that you will handle, I respectfully submit, at the end of this trial. Not - not who is obligated — the question of who is obligated to pay under the law will not be something for Mr. Bell to decide or not be something for Mr. O'Keefe to decide —

MR. O'KEEFE: That's true.[291]

MR. DEAKLE: - or not be something for somebody arbitrarily in New York Ciry to decide. That is for this Court to decide and we could probably stay here all day as we do everyday and argue the law.

MR. O'KEEFE: Your Honor, Mr. Deakle makes a wonderful speech, but all I'm really trying to get to is what is the pattern or the practice or the method of taking care of the obligations —

MR. DEAKLE: But —

MR. O'KEEFE: not whether they exist.

MR. DEAKLE: — but what the problem is he slides this back in to whose obligation under the — under the method of practice here.

THE COURT: I'll take care of that when I instruct the Jury. Ask your question. I'm going to let him ask the question, Mr. Deakle. Go ahead.

MR. BELL: I'm afraid I don't remember it.

MR. O'KEEFE: Could - could the reporter read that back for us prior to Mr. Deakle's objection?

COURT REPORTER: Is it okay to play the tape?

THE COURT: See if you can find it.[292] Sure.

COURT REPORTER'S NOTE: (The following question is the question that was asked previous to Mr. Deakle's objection and was played back on the tape.)

Q But, Mr. Bell, you were aware and are aware, are you not, that the way the welfare plan works is that if a fellow has an occupational or non-accident problem then the Union will pay for it out of the plan; if he has an accident problem they pay for it and get

reimbursed by the employer; didn't you know that?

COURT REPORTER'S NOTE: (The following is the resumption of the questioning).

MR. BELL: I hope we don't have to play anything else back. I don't like to listen to myself on those things.

MR. O'KEEFE: I don't sound any better myself, Mr. Bell, so neither one of us has got anything to be proud of.

A Mr. O'Keefe, I don't really want to sound ignorant. I don't know exactly how the welfare plan works; I'm sorry. I know that there's a health and welfare plan that - that the seaman have a right to get some type of payment out of. My position as an attorney, everytime I've dealt with one of these cases has always been to go directly to the employer because as I understand the law that's his obligation. I know the contract provides for something else, but I always just go to the employer and in fact there's a letter in my file that[292] says from either Mr. Rosenzweig or Mr. Ramsey, it says give us everything, we'll give it to the welfare plan and the employer will do their best to see that we can get these things paid. So, I don't know how the plan works exactly.

BY MR. O'KEEFE:

Q. But - but you were told by either Mr. Ramsey or

Mr. Rosenzweig, pursuant to what you just told me, that this stuff is submitted to the plan in order to satisfy the medical care requirements Mr. Jordan had?

A I was told that the employer would cooperate in trying to get the payment. We made the submission to the plan after several months of trying to get the employer to pay. When we couldn't do that, we made the submission directly to the plan and obtained the payment that has been made.

Q All right. Now, you've indicated to the Jury in the course of your opening statement that - that the employer has paid nothing in medical. Now, let me ask you this, sir. Do you have any way of knowing whether or not the employer has reimbursed the medical plan for the amounts that have been expended?

A No, I don't know that. I have no way of knowing. They may have.

Q And - and so you don't know whether there wasn't a tallying up of the — at the end of the year where the industry sits down with a plan and says how much of a loss this year do we owe? You don't know; do you?

A No, I don't know that. I just know what still has not been paid.[293]

MR. O'KEEFE: I have nothing further on cross, Your Honor.

MR. DEAKLE: I have just one or two since Mr. Ramsey has gotten a little bit afield in his cross-examination.

MR. O'KEEFE: I'm Mr. O'Keefe. Mr. Ramsey's in Seattle.

MR. DEAKLE: Okay. Mr. O'Keefe, I'm sorry.

REDIRECT EXAMINATION

BY MR. DEAKLE:

Q You can tell us that - that to your knowledge, Intercontinental Bulktank, this gentleman's employer, has not paid a dime in regard to the medical bills that are outstanding?

A They have not paid any monies directly to any medical care providers as far as we've been able to determine.

Q While I'm up on one of Mr. O'Keefe's payment questions, do you know whether or not this gentleman has — of your own knowledge has encountered any problems in his medical care and treatment because of the outstanding balances?

A At times he has.

MR. DEAKLE: We have nothing further.

WITNESS EXCUSED

MR. DEAKLE: We call the plaintiff, John Jordan, if it please the Court.

MR. O'KEEFE: Your Honor, If - if[295] I might have a minute. Mr. Rosenzweig has indicated tht he will work with this witness and I'd like to fetch him.

THE COURT: Sure.

MR. O'KEEFE: Thank you.

(OFF-RECORD DISCUSSION).

THE COURT: Let's take a short recess and I'll let it crank down a little bit; it's cooled off.

RECESS

THE COURT: Okay. Back on the record. All counsel are present out of the presence of the Jury. We have a motion.

MR. O'KEEFE: Your Honor, at this time the defense would move for a mistrial in view of the testimony of Mr. Bell and the fact that we believe that this completely a variance with the method by which a trial should be conducted.

THE COURT: Mr. Deakle, you heard that?

MR. PENDLEY: A motion for mistrial.

MR. DEAKLE: For what reason?

MR. PENDLEY: Terry's testimony.

THE COURT: You have any cases that —

MR. DEAKLE: Yeah. Is it just[296] simply because a lawyer testifies?

MR. O'KEEFE: That is certainly the nub of it, Your Honor, but the fact of the matter is we believe this to be very extraordinary as Mr. Deakle has already said in his opening remark. We think it's extraordinary character and inures to our detriment.

MR. DEAKLE: Well, I think that — in response to that the extraordinariness of the situation and the — and the total reason for this defendant's lack of any designation of any — or bringing to the Court any qualifying corporate representatives whatsoever and the — I don't know of a rule that — in of itself says the lawyer is incompetent to testify as a general rule. If there's some testimony that — that they feel made it a mistrial that may be one thing, but just simply because the lawyer

comes to testify, I'm not aware of any rule that - that renders him incompetent or rule that renders him incompetent or makes that reversible error.

MR. O'KEEFE: Your Honor, let me suggest that Mr. Deakle is wrong on two points. Point number one is, he seems to suggest to this Court that it's the obligation of the defendant to bring a[297] corporate representative who is satisfactory to the plaintiff and that's not true.

THE COURT: I don't believe that. Go ahead.

MR. O'KEEFE: All right. Point number two is he says that there is nothing in the rules which prevents a lawyer from testifying. It is however, the case that a lawyer is told in Rule 3.7 of the disciplinary rules that he should avoid acting beyond the course and scope of advocacy for his client and when he testifies, he's more than an advocate.

MR. DEAKLE: Might I inquire whether or not this is a disciplinary proceeding or a trial?

THE COURT: Well, that's the normal case.

MR. O'KEEFE: Well, what we're suggesting is that the normal rules have been

suspended for no good purpose, except Mr. Deakle is not happy with who the corporate representative is.

THE COURT: Well, I've heard all of these objections already and the argument's okay. This is a motion for a mistrial? Overruled.

MR. O'KEEFE: All right. Our second motion, Your Honor, we would ask[298] that Mr. Bell be disqualified from further participation as counsel for the plaintiff inasmuch as he appeared as a witness.

THE COURT: He's going to cross-examine any other witnesses? Is he prepared to do this?

MR. DEAKLE: I assume so. Is - is there some legal or statutory basis for it?

MR. O'KEEFE: Your Honor, again, Rule 3.7 tells us that a lawyer should not appear as a witness and an advocate for his client.

MR. DEAKLE: Your Honor, I don't think that's well-founded. That's a disciplinary rule that has to do with something other than the point we're here about today.

MR. BELL: I - I get an exception — can you give me an exception if I get in trouble?

THE COURT: What's that?

MR. BELL: Am I in trouble?

MR. PENDLEY: Dispensation.

(OFF RECORD).

THE COURT: I don't think we have it in this book. You have a copy of that rule?

MR. O'KEEFE: No, Your Honor, [299]as a matter of fact, it was quoted to me in a telephone call to my office in New Orleans. I regret that I didn't have the opportunity to do the research myself. In view of the exigency of the moment, however, that's the best I can provide.

THE COURT: Well, let me step off the bench and catch the rules out of the office.

RECESS

THE COURT: Okay. Court will come to order. Back on the record. Rule 3.7; is that the rule you were talking about?

MR. O'KEEFE: That's the one I was told about on the telephone, Your Honor.

THE COURT: It says, "A lawyer shall not act as advocate at a trial in which the

lawyer is likely to be a necessary witness except where the testimony relates to an uncontested issue, the testimony relates to the nature and value of legal services rendered in the case or the disqualification of the lawyer would work substantial hardship on the client." I looked in the back and there's a case and in that particular case and I'm not sure, I didn't pull it, just the headnotes said, "Did not have to be disqualified after the attorney was[300] notified by defendant at trial that the attorney was to be called as a witness". In this particular case, just to review the situation and correct me if I'm wrong. the first thing that occurred that the plaintiff called on cross the corporate representative, questioned him as to his knowledge of corporate business and said he knew nothing of it and the information sought by the plaintiff as I'm sure we've heard since, was the information regarding the letters and request for the maintenance and cure payments. At that point plaintiff called defense counsel and I'm sure it was for the same reason to see if these letters were received and the objection was made and I sustained the objection.

MR. O'KEEFE: Your Honor, with all respect, might I suggest there is a slight difference between a corporate representative's questioning which was general by Mr. Deakle as to what he knew. It came as quite a surprise to find out what the reason for the questioning was when he offered to call Mr. Rosenzweig.

THE COURT: Well, you want to — does he know anything about those?

MR. O'KEEFE: He knows nothing about the letters.[301]

THE COURT: Well, that's — I guess that's why he called Mr. Rosenzweig the second round. Then he called co-counsel and asked him the questions about the letters and the information in the letters. I'm sure it was not anticipated that he had to call his co-counsel to testify as to this matter. The rule says, "A lawyer shall not act as an advocate at trial in which the lawyer is likely to be a necessary witness". I'm sure that it wasn't anticipated before today that Mr. Bell had to testify and then it says under 37A3, "Disqualification of a lawyer — it's an exception if the lawyer — if disqualification will work a substantial hardship on the client." If he's prepared to cross-examine other witnesses and the other attorneys aren't, I don't know that for a fact, but it sounded like he was going to take some of the witnesses. That would work a hardship on the client to have an attorney cold, as you fellows know real well, come into a case and examine a witness without any previous preparation.

MR. O'KEEFE: Your Honor, let me — let me however point out to the Court that it is our intention to consult with Mr. Ramsey, who has moved his family and[302] his practice to

Seattle and to determine from him what his side of the story is as to what took place with Mr. Bell.

THE COURT: Okay.

MR. O'KEEFE: Mr. Ramsey no longer represents the party in this case —

THE COURT: I understand.

MR. O'KEEFE: — but if Mr. Ramsey's account varies with Mr. Bell's we most certainly will call Mr. Bell back to the stand —

THE COURT: That may be the case.

MR. O'KEEFE: — and therefore, it is likely that he will testify as a witness yet again in this case and that is why we invoke the rule.

THE COURT: Well, it was not anticipated in this case and I think to disqualifying would work a substantial hardship on the client and I'm —

MR. O'KEEFE: — It is —

THE COURT: — not going —

MR. O'KEEFE: — to be anticipated now, Your Honor.

THE COURT: That's in the middle of a trial. The same thing with the case, where defense counsel called the attorney and he was not — the Court allowed him to stay in the — in the trial and I'm going to do the same. The objection's[303] overruled. It's now ten minutes to twelve, Gentlemen. Your pleasure. How long is the next witness?

MR. DEAKLE: Too long to call him. It's going to be plenty.

THE COURT: Lunch break 'till one o'clock. Notify the —

RECESS

APPENDIX I

[670]MR. O'KEEFE: Your Honor, the defense would move for a mistrial on the basis of a development which was brought to the court's attention this morning and in which we agreed to defer until such time as motions could be heard altogether.

It was reported to Your Honor and Your Honor did investigate[671] the question of whether Mr. Jordan was fraternizing with certain members of the jury this morning before Court was resumed, and was satisfied in discussion with the jurors involved and Your Honor that indeed Mr. Jordan was fraternizing with such individuals.

We suggest to the Court that it doesn't matter whether anything of substance was discussed about the case. Your Honor was verify explicit and very clear in his instructions to the lawyers and the parties that they should refrain from fraternizing with the jury. And the jury was notified that they should not feel put off because the lawyers in the parties apparently snubbed them in the hallways.

Now, the defense has sedulously and carefully followed Your Honor's instructions. And we feel as though we have been taken advantage of, because now Mr. Jordan[672] appears to be the only friendly one in the lot.

I think Your Honor's instructions which were so specific and so ironclad were there for a reason. And that is so that no one enjoys any apparent advantage as Mr. Jordan has taken.

MR. DEAKLE: Your Honor, we understand that an investigation was undertaken by the Court in regard to this matter. We can only say that — we understand that if that occurred it was harmless.

And I am not so sure that Mr. Jordan with his sixth grade education understood the admonition of the Court.

I have not talked with him personally about it, so I cannot represent to the Court one way or the other, nor was I present when the alleged situation took place.

Absent any discussions of a substantive nature about the merits[673] of the case we feel that this motion is not well taken and that it should be denied.

MR. O'KEEFE: Your Honor's instructions when they were given did not include just substantive discussions with jurors. They barred all discussions with jurors.

And I ask the court to enforce its own rule as articulated.

THE COURT: I will do so after this trial is over with for sure.

I — getting the facts straight for the record — was informed that there was some conversation outside the courthouse this morning or downstairs prior to the courthouse being open. There were three or four jurors out there and the plaintiff and I think the plaintiff's son, if that's who he is, was outside the courthouse. There was some conversation.

And it was reported to me.[674]

I went to the jury in the jury room and asked them what was the confrontation outside the courthouse.

And one juror said he had asked Mr. Jordan if the young gentleman was his son. And he said it was. There were a vey few words crossed between them.

And I asked him if this would have any affect — or any of the jurors — if this would have any affect on their judgment in the case. And the word was "no". And I think that was sufficient.

And I will admonish the jury and I will see about any contempt after this case is over with as far as either to the jurors or the plaintiff in this case, but as far as a mistrial is con-

cerned I think that's a bit too harsh a remedy for the situation that occurred. I feel that there is no harm done to either side in the[675] case.

Motion is not granted.

APPENDIX J

[1029]In this case the plaintiff seeks to recover, in addition to the damages which he claims he has sustained as a result of defendant's conduct, an additional sum as punitive damages for the arbitrary failure to pay maintenance and cure by the defendant.

Punitive damages are not favored in the law and are never awarded as of right, no matter how bad the defendant's conduct may be. Punitive damages may be imposed only for conduct that demonstrates a reckless or callous disregard for the rights of the plaintiff, or which shows gross negligence or actual malice.

The adequate protection of an injured seaman against suffering and want requires more than the assurance that he will receive payments at some time in the indefinite future.[1030]

I have already ruled that the plaintiff is entitled to payment of maintenance and cure from the defendant.

Payments must be made at a time close to the illness or injury. An employer who fails to pay maintenance and cure that is owed to a seaman, and does so arbitrarily, capriciously or with callous disregard for the claim, subjects itself to penalty for such failure. "Arbitrarily"

means to do something without an reason. "Capriciously" means to do something without a rational reason. The penalties for arbitrary or capricious failure to pay maintenance and cure are punitive damages.

Punitive damages are added damages awarded for public service in bringing a wrongdoer to account, as an example to warn and deter others from repeating the same act.

They are never awarded to[1031] benefit the injured party or as a matter of right, but rather to punish and to compel the wrongdoer to have due and proper regard for the rights of seamen.

In assessing the amount of punitive damages, you may take into account the financial status of the defendant.

But damages are not due merely because the employer fails to pay maintenance and cure even if they are due. Damages are due only if payment is withheld arbitrarily or capriciously or in callous disregard of the claim.

In resolving this question, you should consider such matters as the nature and timeliness of the notice that the plaintiff gave of his injury, the nature and amount of information available to and discoverable by the employer, the reasonableness of the investigation by the employer and, in general,

[1032]such other matters as may be shown by the evidence to have any bearing on the question of whether or not the employer was arbitrary or capricious or acted with callous disregard in not paying maintenance and cure or in stopping payments of considerable importance.

APPENDIX K

PAIN, MENTAL ANGUISH-PAST AND FUTURE. If you should find that the plaintiff is entitled to a verdict, you may award him a sum which will compensate him reasonably for (1) any pain, suffering and mental anguish already suffered by him and proximately resulting from injury; and (2) for any pain, suffering and mental anguish, which you find from the evidence that he is reasonably certain to suffer in the future from the same cause.

If the facts establish that plaintiff's pain commenced subsequent to this accident and that the plaintiff has established a legal presumption that his disability was caused by the accident.

APPENDIX L

THE COURT: I will read you a straight definition out of Black's Law Dictionary — one sentence — of mental anguish.

"When connected with a physical injury this term includes both the resultant mental sensation of pain and also the accompanying feelings of distress, fright, and anxiety."

Did that do any good?
(The jury answered in the affirmative.)

THE COURT: Recess.

(A short recess was taken.)

(The jury was excused.)